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INFORMATIONS

(CRIMINAL AND QUO WARRANTO),

MANDAMUS

AND

PROHIBITION.

385389
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BY

JOHN SHORTT, LL.B.,

OF THE MIDDLE TEMPLE, ESQUIRE, BARRISTER-AT-LAW;
AUTHOR OF "THE LAW RELATING TO WORKS OF LITERATURE AND ART"
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PHILADELPHIA:
THE BLACKSTONE PUBLISHING COMPANY.
1888.

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PREFACE.

The need has long been felt of some trustworthy exposition of the present state of the law relating to Criminal and Quo Warranto Informations, Mandamus, and Prohibition. Very many years have elapsed since the appearance of a treatise on any of these subjects. Meanwhile the law has undergone profound modification, and the procedure has in many respects been wholly changed.

The present work aims at supplying the need. How far it has succeeded in doing so is left to the candid judgment of the profession.

In extenuation of such shortcomings as may be found in his book, the author would point to the wide field traversed by it, and the great number of authorities which it was necessary to consult.



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NOTE ON REPORTS.

The following opinions on some of the Reports referred to in this work, which the author has met with in his researches, may not be without profit as well as interest to the professional reader:

SIDERFIN.

"This book is fit to be burned, being taken by him when a student, and unworthily done by them that printed it."—*Per* DOLBEN, J., 1 Show. 252.

BARNARDISTON.

"A book of doubtful authority."—*Per cur. R. v. Buller*, 8 East, 393.

HOLT'S REPORTS.

"A book of no authority."—*Per* LEE, C.J., 1 Wils. 15.

MODERN REPORTS.

"Wonnell's case being here cited from 8 Mod. 267, the Court treated that book with the contempt it deserved; and they all agreed that the case was wrongly stated *there* (I mean the old edition of that book)."—3 Burr. 1326, margin.

"Holt complained bitterly of his reporters, saying that the skimble scamble stuff which they published would make posterity think ill of his understanding and that of his brethren on the Bench. He chiefly referred to the Modern Reports which are composed in a very loose and perfunctory manner."—LORD CAMPBELL, 'Lives of the Chief Justices,' vol. ii., p. 136.

VENTRIS, SHOWER, SIR THOMAS JONES, and SIR THOMAS RAYMOND.

"The inaccuracies and the barbarous dialect of Ventris, Shower, Sir Thomas Jones and Sir Thomas Raymond."—*Per* LORD CAMPBELL, 'Lives of the Chief Justices,' vol. ii., p. 47.

BURROW, DOUGLAS, COWPER, DURNFORD and EAST [Term Reports].

"The very best law reporters that have ever appeared in England."—*Per* LORD CAMPBELL, 'Lives of the Chief Justices,' vol. ii., p. 405.



CRIMINAL INFORMATIONS.

CHAPTER I.

NATURE OF INFORMATIONS, AND THE VARIOUS KINDS OF THEM.

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What an information is.

An Information is a suggestion upon record by which, in certain cases, the matter of a suit is allowed to be brought before the High Court of Justice, and is so called from the words by which it gives the Court to understand and be "informed of" the facts alleged in it.

Various kinds.

Informations are, according to Blackstone (*a*), of two sorts, viz., (1) those which are partly at the suit of the sovereign and partly at that of a subject; and (2) such as are only in the name of the sovereign. The former were usually brought upon penal statutes, imposing a penalty upon conviction of the offender, one part to the use of the sovereign and another to the use of the informer, and were a kind of *qui tam* actions (*b*), only carried on by a criminal instead of a civil process.

The same authority (*c*) subdivides Informations exhibited in the name of the sovereign alone into two kinds, viz., (1) those which are truly and properly the sovereign's own suits, and filed *ex officio* by her own immediate officer, the Attorney-General; (2) those in which, though the sovereign is the nominal prosecutor,

(*a*) Book iv. 308.

(*b*) Where one part of the penalty was given to the sovereign, the poor, or some public use, and the other part to the informer or prosecutor, the suit was called a *qui tam* action, because brought by a person "*qui tam pro domino rege, &c., quam pro se ipso in hac parte sequitur*" (Bl. Book iii. 162).

(*c*) Bl. Book iv. 308.

[* 2] yet it is at * the relation of some private person or common informer, and they are filed by the Queen's coroner and attorney in the Court of Queen's Bench, usually called the Master of the Crown Office, who is for this purpose the standing officer of the public.

In Chancery also, where a suit was instituted on behalf of the Crown or of those partaking of its prerogative or under its protection, such as idiots, lunatics, or public charities, the matter of complaint was offered to the Court by way of Information by the proper officer of the Crown, the Attorney- or Solicitor-General: when the suit did not immediately concern the rights of the Crown alone, its officers depended on the relation of some person whose name was inserted in the information; and the relator was responsible for the conduct of the suit as well as for the costs of it. But a relator was in no case indispensable, and never intervened where the rights of the Crown alone were involved (*d*). Now, by Order I., r. 1 of the Rules of the Supreme Court of Judicature, all suits which were formerly commenced by Information in the High Court of Chancery are henceforth to be instituted by action in the ordinary way. Such suits, therefore, are no longer to be entitled Informations (*e*).

There were also Informations, to which the rule just referred to does not apply, on the Revenue side of the Queen's Bench Division; the procedure as to these, for the most part, being left the same as before the Judicature Acts (*f*).

With neither of the two last-mentioned kinds of Information does this work profess to deal.

Origin. "There can be no doubt," says Blackstone (*g*), "but that this mode of prosecution by information (or suggestion) filed on record by the King's Attorney-General, or by his Coroner or Master of the Crown Office in the Court of King's Bench, is as ancient as the common law itself. For, as the King was bound to prosecute, or at least to lend the sanction of his name to a prosecutor, whenever the grand jury informed him upon their oaths that there was a sufficient ground for insti- [* 3] tuting a criminal suit; so, when these, his * immediate officers, were otherwise sufficiently assured that

(*d*) Story's Eq. Pl., ch. 2, § 8.

(*e*) In Attorney-General *v.* Shrewsbury Bridge Co. (W. N. 1880. p. 23), where the statement of claim was indorsed "Information and statement of claim," Jessel, M.R., ordered it to be amended by striking out the title "Information."

(*f*) See Judicature Act, 1873, s. 34, and Order LXVIII., rr. 1, 2.

(*g*) Book iv. 309.

a man had committed a gross misdemeanor, either personally against the King or his government, or against the public peace and good order, they were at liberty, without waiting for any further intelligence, to convey that information to the Court of King's Bench by a suggestion on record, and to carry on the prosecution in His Majesty's name."

Notwithstanding the views of Mr. Earbery, set forth in the 20th vol. of the State Trials, pp. 856 *et seq.*, that Informations dated no higher than the Act of 11 Hen. 7, c. 3 (*h*), and were never heard of before—founded chiefly on the argument of Sir Francis Winnington in Prynn's case (*i*)—it is not open to doubt that Informations had an existence long previous to that Act, and that their origin was not statutory. The elaborate argument prepared (though not delivered) by Sir Bartholomew Shower in the same case (*j*) cites many instances of proceeding by Information, going back as far as the reign of Edw. I. Holt, C.J., and all the Court were of opinion that Informations lay at common law (*k*).

Distinguished from Indictment.

An Information differs from an indictment in little more than this, that the one is found by the oath of twelve men, and the other is not so found, but is only an allegation of the officer who exhibits it (*l*).

(*h*) This statute enabled justices of assize, and also justices of the peace, "upon information for the King, before them to be made . . . . to hear and determine all offences and contempts committed and done by any person or persons against the form, ordinance and effect of any statute made and not repealed," cases of treason, felony, &c., being excluded. It was under this statute that Empson and Dudley proceeded. It was repealed by 1 Hen. 8, c. 6.

(*i*) 5 Mod. 459, s. c. nom. R. *v.* Berchet and Others, 1 Shower, 106. "The rule which I agree to," says Sir Bartholomew Shower, "and lay down as my foundation is this, that no man is to answer the King's suit without some record importing his charge; but that if there be any matter of record or suggestion or surmise upon record, or information filed as of record for the King, importing the charge of an offence; that this may, if the King pleaseth, serve instead of an inquest or verdict either by indictment or presentment, and that the party thereupon shall be compelled to plead to it as a presentment. I do not mean this of treason or felony, though there are two cases even in that too; nor do I mean to prove it by new offences created by statute or informations enacted to be for them, but offences at common law, or such as are made *de novo*, and no particular mode of prosecution appointed."

(*j*) See 1 Show. 117, 118.

(*k*) 5 Mod. 464.

(*l*) 2 Hawk. P. C. c. 26, s 4.

[*4] * CHAPTER II.

EX-OFFICIO INFORMATIONS.

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By whom filed.

THE Attorney-General, or during the vacancy of the office of Attorney-General, the Solicitor General may, in the exercise of his discretion, file an information for any misdemeanor whatsoever (*a*).

Where the Attorney-Generalship is vacant, the record need not aver the vacancy (*b*).

In what cases.

[*5] * The right exists only in the case of misdemeanors; for where a felony is charged the law requires that the accusation be warranted by the oath of

(*a*) "This right has several times been attacked in Parliament without success. The House of Commons agreed in 1688, on the recommendation of a Committee, that a clause should be inserted in the Bill of Rights abolishing informations in the Court of King's Bench; but it would seem that the House of Lords objected to it (13.St. Tr. 1370). On the 27th of November, 1770, a motion made by Mr. Phipps in effect to take away the power of the Attorney-General to file criminal informations was rejected by 164 against 72 votes (16 Parl. Hist. 1175). And again, in 1812, Lord Holland, in the House of Lords, moved the second reading of a Bill having the same object in view (23 Parl. Debates, 1070). The debates on these occasions are well worthy of attention, shewing the strong arguments used by men like Burke, Dunning, Lords Erskine, Holland and Stanhope, against this extraordinary prerogative in cases of libel." (Law relating to works of Literature and Art, 2nd ed., p. 577.)

(*b*) In R. *v.* Wilkes (4 Burr. 2553) one ground of error assigned was that the information was by the Solicitor-General; as to which Lord Mansfield said: "I believe none of us from the beginning ever entertained the least doubt concerning it. An information for a misdemeanor is the king's suit . . . There are many entries in Rastel (title Debt, 192 b. pl. 4; title Escheat, 114 b. pl. 3; title Quare Impedit, 527 b. pl. 1) which shew that at the common law others than the Attorney-General have sued for the king; or, in other words, the king has sued by others as his attornies . . . The Attorney-General is a great officer of the law and of this Court. The Court takes notice when the office is vacant, and by whom it is filled when full. They give credit to the Solicitor-General when he sues as attorney for the king that he has authority. He does it at his peril."

twelve men before the accused can be put to answer it (*c*).

The objects of *ex-officio* Informations, according to Blackstone (*d*) are properly such enormous misdemeanors as peculiarly tend to disturb or endanger the government of the Sovereign, or to affront her in the regular discharge of her royal functions. "For offences so high and dangerous," proceeds Blackstone in his usual strain, "in the punishment or prevention of which a moment's delay would be fatal, the law has given to the Crown the power of an immediate prosecution, without waiting for any previous application to any other tribunal; which power thus necessary, not only to the ease and safety, but even to the very existence of the executive magistrate, was originally reserved in the great plan of the English constitution, wherein provision is wisely made for the due preservation of all its parts."

Instances.

For the earliest examples of Informations the reader is referred to the argument of Sir Bartholomew Shower already referred to (*e*).

In 15 & 16 Car. 2, one was filed against certain brewers of the city of London for conspiracy to take away the gallon trade (*f*); and in 32 Car. 2, for a riot and breaking open the house of the ambassador from the Duke of Savoy, and taking from thence divers goods (*g*).

In more recent times we find instances of such Informations in *R.* v. *Stratton and Others* (*h*) in 1779, where, in consequence of a resolution of the House of Commons (*i*), an information was filed against the defendants for imprisoning the governor and subverting the government of the settlement at Madras, where they were * members of the Council; in 1785 against sev- [*6] eral prisoners for a riot and conspiracy in the King's Bench prison and attempting to blow up the walls thereof with gunpowder (*j*); in another case (*k*) for a riot and dis-

(*c*) 4 Black. Com. p. 310; 2 Hale, 151; 2 Hawk. c. 26, s. 3; Comyns' Dig. and Bacon's Abridgement, title Information.

(*d*) 4 Bl. 308.

(*e*) *Ante*, p. 3.

(*f*) R. *v.* Starling, 1 Sid. 174.

(*g*) R. *v.* Stroude, 2 Show. 149.

(*h*) Doug. 239.

(*i*) "Although the Attorney-General may, if he think fit, exhibit a criminal information *ex officio* for any misdemeanor whatever, yet in practice he seldom does so, except when directed by the House of Lords, or the House of Commons, or the Lords of the Treasury, or the commissioners of some public department, *e.g.*, the excise, customs, stamps, and taxes, War Office, Admiralty, &c., or where the case is of a very serious nature" (Cole on Informations, 9).

(*j*) 3 Chitty's Crim. Law, 1150.

(*k*) 2 Ch. C. L. 490a.

turbance of commissioners acting under the Property Tax Acts: also for insulting and vilifying such commissioners in their presence whilst acting in the execution of their office, in hearing and determining appeals relating to the income tax (*l*); also for assaulting and presenting a gun at excise officers acting under warrants of distress (*m*); for offering to bribe Custom-house officers to refrain from seizing forfeited goods (*n*); against a bribed Custom-house officer (*o*); against various persons for attempting to defraud the revenue (*p*); in 1791 against a pilot for not performing quarantine as directed by Order in Council (*q*); in 1804 against certain officers of the East India Company for receiving presents in India contrary to 33 Geo. 3, c. 52 (*r*); and in 1846 against a person who had held the office of Resident of Tanjore under the East India Company for extortion in receiving gifts (*s*); for holding a fair without any legal warrant, royal grant, or right whatsoever (*t*); and for spreading false rumours in order to enhance the price of hops (*u*). In 1748 an information was filed against the vice-chancellor of the University of Oxford for misdemeanor and misbehaviour in the neglect of his duty, both as vice-chancellor and a justice of the peace of the university (*x*).

Ex-officio informations have also been filed both in Ireland and England for offences at parliamentary elections, *e.g.*, in *R.* v. *Duggan* (*y*) against a Roman Catholic bishop for undue influence; and in *R.* v. *Conway* (*z*) against a Roman Catholic priest for obstructing, assaulting, and imprisoning voters, and employing spiritual intimidation; in *R.* v. *Leatham* (*a*) for advancing [* 7] a sum of money * with intent that it should be expended in bribery at a parliamentary election; in

(*l*) 3 Ch. C. L. 914.
(*m*) 2 Ch. C. L. 127.
(*n*) 3 Ch. C. L. 693.
(*o*) 3 Ch. C. L. 689.
(*p*) 4 Went. Prec. 442 *et seq.*
(*q*) R. *v.* Harris, 4 T. R. 202.
(*r*) R. *v.* Stevens & Agnew, 5 East, 244. R. *v.* Holland (4 T. R. 457) was also an information by the Attorney-General for offences committed in India, but the report does not say of what nature the offences were.
(*s*) R. *v.* Douglas, 13 Q. B. 42.
(*t*) R. *v.* Bigley, 2 Gude's C. P. 249.
(*u*) 2 Ch. C. L. 527.
(*x*) R. *v.* Purnell, 1 Wils. 239.
(*y*) 7 Ir. Rep. C. L. 94.
(*z*) 7 Ir. C. L. R. 507.
(*a*) 3 E. & E. 658.

1861 for bribery at a parliamentary election, the information being filed in pursuance of a resolution of the House of Commons (*b*). After the general election of 1880 several prosecutions were thus instituted in England against persons who had been reported by Royal Commissioners as guilty of illegal and corrupt practices, and who had not obtained certificates of indemnity from the Commissioners.

Libels.

The libels against which the Attorney-General has used this power are only those of a public character, such as blasphemous, obscene or seditious publications, or libels reflecting on persons exercising public functions.

Blasphemous.—Instances of informations for blasphemous libels are furnished by the cases of *R.* v. *Waddington* (*c*); *R.* v. *Eaton* (*d*); *R.* v. *Carlile* (*e*).

Obscene.—Obscene libels (*f*) were thus prosecuted in the cases of *R.* v. *Wilkes*, (*g*) and *R.* v. *Curl* (*h*). *R.* v. *Stuart* (*i*) was an information for a "wicked and mischievous" libel by publishing in a newspaper an advertisement of a married woman offering to become a mistress.

* *Seditious.*—Informations for seditious libels [*8] have been most frequent, such libels being attacks (1)

(*b*) R. *v.* Boyes, 1 B. & S. 311. See also R. *v.* Charlesworth, 1 B. & S. 460.

(*c*) 1 B. & C. 26.

(*d*) 31 How. St. T. R. 927.

(*e*) 3 B. & Ald. 161.

(*f*) "The jurisdiction of our Common Law Courts in cases of publications of an immoral nature, though now unquestioned, was for some time not free from doubt. After the abolition of the Star Chamber, it seems that the Court of King's Bench came to be regarded as the *custos morum* of the nation, having cognizance of all offences against the public morals (Sir Charles Sedley's case, 1663. 1 Sid. 168, 2 Str. 790.) But though one Hill was indicted in Michaelmas, 10 Will. 3 (2 Str. 790; Dig. L. L. 60), for printing and publishing some obscene poems of Lord Rochester, tending to the corruption of youth, and, on going abroad, was outlawed for the offence; yet in Easter, 6 Anne, in the case of Read (Fort. 98), who was indicted and convicted for publishing a lascivious and obscene libel, Holt, C.J., and Powell, J., on a motion in arrest of judgment, were so strongly of opinion that the offence was only punishable in the Ecclesiastical Courts that no judgment was pronounced against the defendant. However, the case of Rex *v.* Curl (2 Str. 789, 790), in 1 Geo. 2, settled the question in favour of the jurisdiction of the temporal courts. . . . Since this decision the temporal character of the offence of publishing obscene and immoral works has not been questioned" (Law relating to Works of Literature and Art, 2nd ed., p. 382).

(*g*) 4 Burr. 2527.

(*h*) 2 Str. 788.

(*i*) 3 Ch. Cr. Law, 887.

either upon the Sovereign personally, (2) upon the administration, or (3) upon the constitution generally. *R.* v. *Clerk* (*j*); *R* v. *Nutt* (*k*); *R* v. *Lambert and Perry* (*l*); *R.* v. *Harvey* (*m*); *R.* v. *Wilkes* (*n*), were personal attacks on the Sovereign and on the Prince Regent.

The following were for libels on the administration:—*R.* v. *Tutchin* in 1704 (*o*) for publications in the *Observator* lamenting the sad state of the country owing to the influence of French gold on those who had the conduct of affairs, and attributing ignorance and incapacity to those who had the management of the Navy: *R.* v. *Francklin* in 1731 (*p*) for printing and publishing the celebrated "Letter from the Hague": *R.* v. *Horne* in 1777 (*q*) for writing and causing to be printed and published certain resolutions of a public meeting referring to the Englishmen who, "preferring death to slavery, were for that reason only inhumanly murdered by the king's troops" during the American war of Independence: *R.* v. *Cobbett* in 1804 (*r*) for a libel upon the Irish Government and upon the public conduct and character of the Lord Lieutenant and Lord Chancellor of Ireland: *R.* v. *Hunt* in 1811 (*s*) for a libel tending to create disaffection in the army: *R.* v. *Sutton* in 1816 (*t*) for a libel with reference to a certain popular outbreak at Nottingham: *R.* v. *Burdett* in 1820 (*u*) for a libel, contained in an address to the electors of Westminster, upon the king's troops and the Government. The latest instance seems to have been in 1830, when Sir James Scarlett, A. G., filed three informations against the proprietors and printers of the *Morning Journal* for libels on the king, the House of Commons, the Lord Chancellor and the Duke of Wellington (*v*). [*9] *Seditious libels on the constitution generally were

(*j*) 1 Barnardiston, 304.
(*k*) 1. Barn. 306.
(*l*) 2 Camp. 398. See Lord Ellenborough's exposition of the law in this case.
(*m*) 2 B. & C. 257.
(*n*) 4 Burr. 2527, the famous case of the North Briton, No. 45; see also R. *v.* Woodfall, 5 Burr. 2661, and R. *v.* Almon, id. 2686.
(*o*) 14 How. St. Tr. 1095. See an earlier case, R. *v.* Lawrence, 12 Mod. 311.
(*p*) 17 How. St. Tr. 626.
(*q*) 20 How. St. Tr. 651; 2 Cowp. Rep. 672.
(*r*) 29 How. St. Tr. 1.
(*s*) 31 How. St. Tr. 408.
(*t*) 4 M. & S. 532.
(*u*) 3 B. & A. 717.
(*v*) 72 Annual Register, 4. These proceedings were received with universal dislike by all parties in the country.

proceeded against by information in the following cases: *R.* v. *Harrison* (*w*); *R.* v. *Brown* (an attack on the constitution as settled at the Revolution) (*x*); *R.* v. *Nutt* (*y*), and *R.* v. *Paine* (*z*).

On Houses of Parliament.—Libels on the Houses of Parliament have also been proceeded against in this manner, on an address to the Crown, voted by either House, requesting that the Attorney-General should prosecute. One Rainer was so proceeded against in 1733 (*a*); William Owen in 1752 (*b*); Stockdale in 1789 (*c*), and Reeves in 1796 (*d*).

Courts of Justice.—Libellous contempts of Courts of Justice have also, in former times, sometimes been punished by information, *e. g.*, *R.* v. *Gordon* (*e*); *R.* v. *Kent* (*f*), and *R.* v. *White* (*g*).

Foreign Rulers.—Libels on foreign rulers, ambassadors, &c., have likewise been thus proceeded against:—in *R.* v. *Peltier* (*h*) (a libel on Napoleon Bonaparte, when first Consul); *R.* v. *Vint* (*i*) (a libel upon the Emperor Paul I. of Russia); *R.* v. *Gordon* (*j*) (libels on Queen Marie Antoinette, and the French ambassador in London); *R.* v. *D'Eon* (*k*) (a libel on a previous French ambassador); *R.* v. *Bew* (*l*) (a libel on the Russian ambassador).

Other cases.

Formerly the Attorney-General proceeded by *ex-officio* information in many cases in which, at the present day, he would consider his interposition uncalled for and inappropriate: such as cases of repair of highways, trespass, nuisance, and riot (*m*). In 21 Car. 2 an information was filed against *Parris and others* (*n*) for cheating a young lady and unlawfully procuring a warrant of attorney to * confess a judgment in a very [* 10]

(*w*) 3 Keb. 841; Vent. 324.
(*x*) Trin. Term, 5 Anne, 11 Mod. 86.
(*y*) Mich. Term. 27 Geo. 2; Dig. L. L. 88.
(*z*) 32 Geo. 3, K. B. MSS.; Dig. L. L. 89.
(*a*) R. *v.* Rainer, 2 Barn. 293.
(*b*) R. *v.* Owen, 18 How. St. Tr. 1203.
(*c*) 22 How. St. Tr. 177.
(*d*) 26 How. St. Tr. 530.
(*e*) 22 How. St. Tr. 177.
(*f*) 3 Chitt. Cr. L. 878; 4 Went. Prec. 414.
(*g*) 1 Camp. N. P. 359.
(*h*) 28 How. St. Tr. 617.
(*i*) 27 How. St. Tr. 627, 643.
(*j*) 22 How. St. Tr. 175.
(*k*) W. Bl. Rep. 501, 517.
(*l*) 2 Chitt. Cr. L. 54; 4 Went. Prec. 410.
(*m*) See 1 Show. 110–116; Cro. Car. 266, 267; 1 Sid. 140.
(*n*) 1 Sid. 431.

great sum. *R.* v. *Ward* (*o*) was an ordinary case of forgery, viz., that of the Duke of Buckingham's name to a certificate about the delivery of a quantity of alum bought by him.

There are examples of Informations to be found in the time of the Commonwealth: in Hilary, 1650, *Banco Superiori*, an information against Mayne and two justices of the peace for not inquiring of a riot which was committed near their residence according to the statute of 2 Hen. 5, c. 5 (*p*); and in 1658 an information against Charles Dudley, the titular Duke of Northumberland, for forging the entry of a marriage between Sir Robert Dudley and Frances Vavasor, lady of honour to Queen Elizabeth, in the register book of East Greenwich (*q*).

Leave to file not given.

As the Attorney-General has himself the right, *ex-officio*, to exhibit an information in any case which he deems fitting, the Court will never grant an information on his application in cases prosecuted by the Crown, or give leave to him to file one (*r*). "It would be a strange thing," said Lord Mansfield, "for the Court to direct their officer to sign an information which the Attorney-General might sign himself if he thought proper; and if he did not think it a proper case, it would equally be a reason why the Court should not intermeddle" (*s*).

A. G. may previously give defendant opportunity of shewing cause.

The Attorney-General may, if he thinks fit, call on the intended defendant to shew cause why the information should not be exhibited before he signs it (*t*).

The information when signed by the Attorney-General is filed without any rule of Court or recognizance.

Fiat in case of newspaper libels.

Sect, 3 of the Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60), providing that no criminal prosecution for a newspaper libel shall be commenced without the written fiat of the Director of Public Prosecutions, does not apply to *ex officio* informations filed by the Attorney-General (*u*).

Quashing.

The Court has power to quash the information upon motion (*x*); but it is a power which the Court will

(*o*) 2 Lord Ray. 1461.
(*p*) Stiles, 245, 246; 1 Show. 110.
(*q*) 2 Sid. 71.
(*r*) R. *v.* Phillips & Others, 3 Burr. 1565, and 4 Burr. 2090.
(*s*) 4 Burr. 2090.
(*t*) *Per* Lord Mansfield, *ib.*
(*u*) R. *v.* Yates, L. R. 11 Q. B. D. 750, *per totam curiam.*
(*x*) Fountain's Case, 1 Sid. 152.

rarely, if ever, exercise, * because the Attorney- [* 11] General, if he finds the information defective, may enter a *nolle prosequi* and prefer a new charge (*y*), whilst the defendant's remedy is by demurrer or plea (*z*). A further reason is that a criminal information may be amended, almost, as of course, at any time, even after demurrer or plea (*a*).

Staying proceedings by private individual.

The Court will not restrain the Attorney-General from filing an *ex-officio* information on the ground that a criminal information has already been granted on the application of a private individual; but in such a case the Court has stayed proceedings by the private individual until further order (*b*).

(*y*) R. *v.* Stratton, Doug. 240.
(*z*) R. *v.* Nixon, 1 Str. 185; R. *v.* Gregory, 1 Salk. 372.
(*a*) R. *v.* Holland, 4 T. R. 457; R. *v.* Wilkes, 4 Burr. 2528, 2532, 2566, 2568, 2573.
(*b*) R. *v.* Alexander, MS. E. T. 1839, cited Arch. Crim. Pl. 122 (20th ed.).

[* 12]

* CHAPTER III.

INFORMATIONS NOT EX-OFFICIO.

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INFORMATIONS other than the *ex officio* informations treated of in the preceding chapter can now only be filed by express permission of the Court, on application duly made to it.

Practice before 4 & 5 Wm. & M. c. 18.

Before the statute 4 & 5 Wm. & M. c. 18, it was otherwise. "The power of filing informations," says Blackstone (*a*), "without any control then resided in the breast of the Master of the Crown Office, and being filed in the name of the King, they subjected the prosecutor to no costs, though on trial they proved to be groundless. This oppressive use of them in the times preceding the Revolution occasioned a struggle, soon after the accession of King William, to procure a declaration of their illegality by the judgment of the Court of King's Bench. But Sir John Holt, who then presided there, and all the judges, were clearly of opinion that this proceeding was grounded on the common law, and could not be then impeached."

4 & 5 Wm. & M. c. 18.

A few years afterwards Parliament enacted a remedy by the statute 4 & 5 Wm. & M. c. 18, which recites that "divers malicious and contentious persons have more of late than in times past procured to be exhibited and prosecuted informations in their Majesties' Court of King's Bench, at Westminster, against per- [* 13] sons in all the * counties of England for trespasses, batteries, and other misdemeanors, and after the parties so informed against have appeared to such

(*a*) Book iv. 310.

informations and pleaded to issue, the informers do very seldom proceed any further, whereby the persons so informed against are put to great charges in their defence; and although at the trials of such informations verdicts are given for them, or a *nolle prosequi* be entered against them, they have no remedy for obtaining costs against such informers."

It then enacts that "the Clerk of the Crown in the Court of King's Bench for the time being shall not, without express order to be given by the said Court in open court, exhibit, receive, or file any information for any of the causes aforesaid, or issue out any process thereupon before he shall have taken or shall have delivered to him a recognizance from the person or persons procuring such information to be exhibited, with the place of his, her or their abode, title or profession, to be entered to the person or persons against whom such information or informations is or are to be exhibited, in the penalty of twenty pounds, that he, she, or they will effectually prosecute such informations or information, and abide by and observe such orders as the said Court shall direct."

Sect. 6 contains a proviso that nothing in the Act relating to informations shall extend or be construed to extend, to any other informations than such as are or shall be exhibited by the Master of the Crown Office. So that *ex-officio* informations by the Attorney-General are not affected by the statute.

Discretion of Court not affected by the statute.

"That statute," said Lord Kenyon (*b*), "does not enumerate the grounds which are sufficient to enable us to grant an information; but the Legislature left it to our discretion, trusting that we should not so far transgress our duty as to go beyond the rules of sound discretion."

The rules of sound discretion have, in the course of time, undergone considerable modification, and there is no doubt that the Court would now unhesitatingly refuse to grant informations in many cases where they would formerly have been obtained. Attention will be called to these cases later on.

Class of cases in which granted.

In general, the kinds of cases in which informations of this * character would now be granted are [* 14] attacks upon and offences by public officials or persons occupying certain prominent public positions, as such.

Libels.

As to libellous attacks upon such persons, "the remedy," says Lord Blackburn (*c*) "had usually and prop-

(*b*) R. *v.* Jolliffe, 4 T. R. 290.

(*c*) R. *v.* Lord Winchelsea, cited by Lord Coleridge, C.J., in R. *v.* Labouchere, L. R. 12 Q. B. D. 327.

erly been confined to cases of magistrates, ministers, public officers, and persons in a high position whose character was of such public importance as to require immediate vindication."

In the language of two other judges (Mellor, J., and Huddleston, B.), the exercise of this extraordinary jurisdiction was "reserved for cases of libel upon persons in an official or judicial position, and filling some office or post which made it for the public interest necessary that such jurisdiction should be exercised for the refutation of the libellous charges made" (*d*).

The rule laid down by Cole (*e*) that "the Court will grant leave to file criminal informations for gross libels on *private individuals*, where the imputations are of a serious nature and totally unfounded" no longer holds. There has, no doubt, been a long succession of such cases. In *R.* v. *Benfield* (*f*), in 1760, an information was granted against certain persons for singing in the streets libellous songs reflecting upon the son and daughter of a grocer at Cheltenham; in *R.* v. *Kinnersley* (*g*), in 1761, against a newspaper proprietor for publishing a ludicrous account of the marriage of an Irish nobleman (a married man) with an actress; in *R.* v. *Dennison* (*h*) (in the year 1773) against the writer of a letter to a nobleman threatening to accuse him of unnatural practices unless he complied with certain demands of the writer; in *R.* v. *Sober* (*i*), in 1832, against a newspaper proprietor, for publishing that a woman offered to swear her child to one of three persons, including the prosecutor; in *R.* v. *Gregory* (*k*), in 1838, for a libel upon the family of a nobleman in alleging that at [* 15] the time of his marriage he * had another wife living. A similar case was *R.* v. *Kintoul and Others* (*l*), for publishing in a newspaper that "the amount of public money received by the Somersets since the late Duke of Beaufort came of age, far exceeds the value of the estates he bequeathed to the present Duke;" and *R.* v. *Staples* (*m*) appears to have been a case of an or-

(*d*) Cited (with approval) in the judgment in R. *v.* Labouchere, L. R. 12 Q. B. D. 328; the language cited being used in refusing an application of the Musical critic of *The Times*, for a libel imputing to him personal corruption.

(*e*) Informations, 18. (*f*) 2 Burr. 980.

(*g*) 1 Wm. Bl. 294.

(*h*) Lofft. 148.

(*i*) H. T. 1832, cited Cole, 22.

(*k*) 8 A. & El. 907.

(*l*) H. T. 1831; cited Cole, 20.

(*m*) Andr. 228. See also R. *v.* Smith (M. T. 1831), referred to in the judgment in R. *v.* Labouchere, L. R. 12 Q. B. D. 326.

dinary libel on an alderman and justice in his private capacity. In *R.* v. *Mead* (*n*) the application was refused as resting on light and trivial grounds.

The practice of granting these informations in cases of private libels, as observed by Lord Coleridge, C. J., in *R.* v. *Labouchere* (*o*), appears to have reached its greatest height in the time of Lord Tenterden, who seems to have been of opinion that an information ought to be granted in every case of libel (*p*).

Modern practice.

"The general dissatisfaction of the profession with this state of things," says Lord Coleridge, in the same case (*q*) "led in the time of Lord Denman and Lord Campbell to a much stricter practice in this Court in the granting of these informations. I am quite aware that *R.* v. *Gregory* (*r*), *R.* v. *Latimer* (*s*), and a few cases of this sort occurred during this period of time; but there can be no doubt that the cases were rare, except where some person in a public or official position was attacked, in relation to such position, or where the attack was of so cruel and outrageous a sort as to make it, according to the view of Hawkins, a matter which interested the public and called for the interference of the Court as representing the public and charged with the defence of its interests. So it was during the greater part of the time of Sir Alexander Cockburn, though towards the close of his life the practice of the Court became somewhat easier and laxer. I have, however, by the kindness of a learned friend, been furnished with the reports of fifty cases (*t*) of criminal informations, running over the years from 1860 to 1880 inclusive; and out of these fifty cases, four only * were cases of informations granted [*16] at the suit of persons who were not in some public office or position; and during that time there were repeated declarations by various members of the Court, not, indeed, that as matter of law the information would not be granted at the suit of private persons, but that the Court would as a general rule leave private persons to their private remedies."

Lord Coleridge added: "I am able from my own

(*n*) 4 Jur. 1014.
(*o*) L. R. 12 Q. B. D. 325.
(*p*) See the language attributed to him in R. *v.* Kintoul & Others, Cole. 20.
(*q*) 12 Q. B. D. 326, 327.
(*r*) 8 A. & El. 907.
(*s*) 15 Q. B. 1077.
(*t*) They are not to be found in the usual legal reports, being cases of discretion, generally turning upon the facts.

recollection to state two cases—each of them, I think, important. This Court in the time of Lord Campbell refused Sir Charles Napier a criminal information for a libel imputing to him great misconduct in regard to his conquest of Scinde, on the ground, amongst others, that he had ceased to be commander-in-chief in India, and was at the time of his application to the Court only a private person. And a rule for a criminal information in the case of *R.* v. *Plimsoll*, in which I was myself counsel, was discharged after argument, for a libel in which a member of Parliament was accused of sending his ships to sea overloaded, in order that they might sink and he might gain the insurances on them. The rule was discharged without costs, inasmuch as the applicant had cleared his character; but the Court left him to his ordinary remedy as a shipowner against any one who libelled him in that character."

General rule. The judgment of the Court (*u*) in *R.* v. *Labouchere* (*x*) expresses the hope that criminal informations may hereafter be granted only in cases which come fairly within the following language of Blackstone (*y*): "The objects of the other species of informations filed by the Master of the Crown Office upon the complaint or relation of a private subject, are *any gross and notorious misdemeanors, riots, batteries, libels, and other immoralities of an atrocious kind*, not peculiarly tending to disturb the government (for those are left to the care of the Attorney-General), but *which on account of their magnitude or pernicious example, deserve the most public animadversion*" (*z*)—a passage sufficiently lacking in precision as to afford scope for much future discussion.

Libels on peers, &c., in [* 17] * The most exalted social position on the part of the applicant will not entitle him to an information

(*u*) Consisting of the large number of five judges (Lord Coleridge, C. J., Denman, Field, Hawkins, and Mathew, JJ.) "to establish, if possible, upon unusual authority, some principles for our guidance in future": L. R. 12 Q. B. D. 330.

(*x*) Ib.

(*y*) Book iv. c. 23, p. 309.

(*z*) Denman, J., added that he could not accept this passage from Blackstone, "as being quite an exhaustive description of the cases in which the Court ought to interfere. For example, if a newspaper or an individual were to shew, by repeated attacks, and by wide circulation of those attacks, upon a private individual, whether a British subject or a foreigner, whether resident in England or abroad, a persistent determination to persecute, as at present advised, I should think it would be the duty of the Court to protect the individual by granting a rule, and even, in case of further persistence, by making it absolute": L. R. 12 Q. B. D. 331.

if the libel is directed against him in his private character only. their private character.

"I can find nowhere," said Lord Coleridge in the same judgment, "any trace of the doctrine that a peer as such, is entitled to exceptional and most important privileges in the administration of the law. If a peer is libelled *as a peer* for his conduct in Parliament, or as lord-lieutenant (if he is one), or as magistrate, or as the holder of a public office, it would undoubtedly be almost of course (all other legal conditions being fulfilled) that the Court should intervene in his behalf. But that a peer, in private matters, is entitled to any interference at the hands of this Court which the Court would not extend in favour of the humblest subject of the Queen, I respectfully but emphatically deny. I am not aware of any authority for such a proposition (*R.* v. *Gregory* (*a*) is certainly no such authority), and I decline to make one" (*b*).

The information in *R.* v. *Labouchere* was refused on two other grounds also; (1) because the libel was on the dead, and (2) because the applicant was neither resident nor sojourning in this country.

After going through the various cases in which proceedings have been taken in respect of libels on deceased persons, Lord Coleridge thus expresses the opinion of the Court: "There is no instance of an action for libel by the representative of a deceased person; it must be, I think, some very unusual publication to justify an indictment or information for aspersing the character of the dead. If such a case should ever arise, it must stand upon its own footing" (*c*). Libel on dead.

As to the objection that the applicant was neither resident nor sojourning in the country, the Court said: "We do not intend to lay it down as a rule of law that this Court will not interfere under *any circumstances by way of criminal information on the application of a person so situated. Cases may be put, or may actually arise, in fact, in which this Court would interfere beyond all question, if the person applying to it were an English subject or were resident in England; and the single fact that the applicant was situated as the applicant is situated here, might not in such a supposable case be an answer to the application. But it is obvious that, if we have regard to the principles on which from very early times this Court has acted, the Applicant resident abroad. [* 18]

(*a*) 8 A. & E. 907.
(*b*) L. R. 12 Q. B. D. 329.
(*c*) L. R. 12 Q. B. D. 324.

non-residence of the applicant in England is a very cogent argument against the interference of the Court. It makes it as a general rule very unlikely that there should be any intention to provoke a breach of the peace on the part of him who publishes the defamatory matter, and also, generally speaking, very unlikely that, in fact, any breach of the peace will follow. It is a matter, therefore, very important for the Court to consider, when the appeal is to its discretion; a reason further why, in the exercise of that discretion, the Court should be unwilling to interfere" (*d*).

Applications merely in order to obtain an apology.

In modern times a practice sprang up of using the machinery of the Court for the purpose merely of extorting an apology for libel, with no intention of carrying the proceedings further. The Court in later times discouraged the practice; and what may be considered as a decisive check was given to it in *R.* v. "*The World*" (*e*), by the Queen's Bench Division (Cockburn, C.J., Mellor and Field, JJ.). The prosecutor (Mr. Horsman), having, on the argument of the rule, extracted what he considered a sufficient apology, was willing that the rule should be discharged, Cockburn, C.J., said: "I can quite understand that he, having vindicated his character, is not animated by any vindictive feeling; but we stand in a different position. With us it is not a question of the vindication of character; it is one of public justice. Here a libel of a most serious character is brought before us, and the question is whether we shall sanction the compromise between the parties, or whether the prosecution, having been once instituted, ought not to take its course, its object being, not the vindication of character, but the repression of scandalous libels. It has been too much the practice for the applicant to come and say he is [* 19] satisfied, * having obtained an apology; but the question is whether, there being a serious offence against the law, the proceeding ought to be allowed to stop, and whether we ought to listen to any proposal to compromise so serious a case." After saying that the Court could not compel the prosecutor to go on, the Lord Chief Justice added that he hoped it would be understood that "if this Court is resorted to, in cases of flagitious libel, merely for the purpose of vindicating the character of the individual, it will be incumbent upon us, in order that our process may not be used simply for private purposes, to require, before we allow the

(*d*) L. R. 12 Q. B. D. 321, 322.
(*e*) 13 Cox, Crim. Cas. 305.

proceedings to be instituted, an undertaking by counsel on the part of the prosecutor to proceed with the prosecution, in order to insure its being carried to its legitimate conclusion."

In the following cases informations were granted for libels :—

Examples of informations for libel.

Members of Parliament.—*R.* v. *Haswell* (*f*) for a libel in the *Morning Post* upon the Duke of Richmond, relating, amongst other things, to speeches made by him in the House of Lords, and imputing treasonable practices to him.

Magistrates.—In 1775 for a libel on the justices of Suffolk in an advertisement respecting the expenditure of money in the hands of the county treasurer (*g*) ; in the same year, for publishing a pamphlet charging the justices of Middlesex with ignorance and corruption in the execution of their office (*h*) ; but not for spoken words calling a magistrate a liar in the presence of several persons, saying he was unfit to be a magistrate, and adding that he should hear the same every time he came into the town, unless there appears an intention to provoke a breach of the peace (*i*) ; nor for saying of a justice "if he is a sworn justice he is a rogue and a forsworn rogue" (*k*), nor for spoken words imputing to a justice malversation in his office, if they were neither spoken at the time when he was acting as justice, nor tended to a breach of the peace (*l*) ; nor for an

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(*f*) 1 Doug. 387.

(*g*) R. *v.* Alderton, cited 5 B. & Ald. 596.

(*h*) R. *v.* Holloway & Allen, cited *ib.*

(*i*) *Ex parte* Chapman, 4 A. & El. 773; cf. *Ex parte*, Dale, 2 C, L. Rep. 870.

(*k*) R. *v.* Pocock, 2 Str. 1157; cf. R. *v.* Weltje, 2 Camp. 142, a case of an indictment.

(*l*) *Ex parte* Duke of Marlborough, 5 Q. B. 955. In this case Lord Denman said : "It is clear, upon all the authorities, that words merely spoken are not the subject of a criminal information . . . The exception is in those cases where the words amount to a provocation to break the peace, by their inciting either to personal violence or to a challenge. We have, however, felt some doubt as to that charge which imputes corruption in the character of a magistrate . . . But we find no precedent for granting a criminal information in such a case. It has often been said that the Court will not interfere, except where the words are uttered at the the time when the magistrate is performing his duty: and the reason of that exception is that there a direct obstruction is created to the course of justice. The magistrate, in such a case, may treat the words as contempt; but in my opinion it is then far more expedient that this Court should interfere." A dictum of Starkie [Libel and Slander] to a different effect, does not, according to Lord Denman, appear to be founded on any authority.

[*20] assault on a mayor in the * execution of his office where the mayor struck the first blow (*m*). An information was, however, granted for calling a mayor a scoundrel, challenging him to fight a duel, and threatening to post him as a coward if he would not fight (*n*).

Clergy.—In 1822 for a libel upon the clergy of the diocese of Durham (*o*); and in 1831 for a publication by the church-wardens of a parish charging the clergy in general, and the incumbent in particular, with harshness and rigor in the exaction of tithes (*p*).

Town Clerk.—An information was granted for writing to the mayor of a borough; "I am sure that you will not be persuaded from doing justice by any little arts of your town clerk, whose consummate malice and wickedness against me and my family will make him do anything, be it ever so vile" (*q*).

Other cases.—An information was granted (14 Geo. 2) for a libel upon the East India Company, though the imputation was, in the singular, against "an East India director" (*r*); also for a libel upon the Portuguese Jews recently come to England, suggesting that they were so barbarous as to burn the child of one of their women because it was begotten by a Christian (*s*).

On a body of persons.—It will be observed that in many of the foregoing cases the libels were upon a body of persons. "Where a paper is printed," says [*21] Lee, C.J., (*t*) "greatly reflecting upon a * certain number of people, it reflects upon all; and readers, according to their different opinions, may apply it so. It has been the rule of this Court always to endeavor to prevent libels upon societies of men."

Riotous proceedings.

A rule for an information was granted for disturbing the public worship of a dissenting congregation, though it was afterwards discharged, with costs, on the ground of a suppression of truth on the part of the applicant (*u*). But an information was refused for an affray of a political kind, not happening at an election but on a racecourse, between the adherents of the rival candidates (*x*); also for a refusal by churchwardens to let the

(*m*) R. *v.* Symonds, Cas. Temp. Hardw. 240.
(*n*) 6 Went. Prec. 461.
(*o*) R. *v.* Williams, 5 B. & Ald. 595.
(*p*) R. *v.* Epps, cited Cole, 20.
(*q*) R. *v.* Waite, 1 Wils. 22.
(*r*) R. *v.* Jenour, 7 Mod. 400.
(*s*) R. *v.* Osborn, 2 Barnard. 138, 166.
(*t*) R. *v.* Jenour, 7 Mod. 401.
(*u*) R. *v.* Wroughton, 3 Burr. 1683.
(*x*) R. *v.* Kynaston, 2 Barnard. 378.

parishioners meet in the church about public business in pursuance of a notice given for that purpose, the Court not thinking the offence great enough to require an information (*y*).

A rule for an information was granted for compelling a man, by a riotous assembly and threats, to lower the price of his butter and cheese; but it was subsequently discharged because of the contradictory character of the evidence (*z*).

An information was granted against certain gunmakers for a conspiracy to ruin certain other gunmakers, by making riots before their house and shop, seducing their workmen, making declarations of ill will towards them, threatening bodily injury to their agent, and attempting to do him bodily injury (*a*); also for a conspiracy to ruin an actor (Charles Macklin) in his profession, by making a riot at Covent Garden Theatre and preventing the performance of a play in which he was to act, and obliging the manager to come on the stage and discharge him (*b*).

Informations have been granted for a riotous attack upon constables and magistrates (*c*); for riotously breaking the fences and enclosures of a lord of a manor (*d*); for a riotous disturbance at an election of bailiffs and burgesses of a corporation (*e*).

The Court discharged a rule granted for obstructing the election * of lord mayor of the City of Lon- [* 22] don in a violent and tumultuous manner, it appearing that the offenders acted in the *bonâ fide* assertion of a claim of right (*f*).

Assault.

An information was in one case granted for an enormous assault (*g*); and in another case for, so far as appears from the report, a common assault (*h*). An application by one attorney for a criminal information against another for an assault, in consequence of proceedings taken by the applicant professionally, was refused on the ground that the applicant had already taken other proceedings (*i*).

(*y*) Anon. 2 Barnardist. 166.
(*z*) Tuite or Chote *v.* Fawkes, Lofft. 64.
(*a*) R. *v.* Hadley and Others, E. T. 14 Geo. 3; 6 Went. Prec. 439.
(*b*) R. *v.* Leigh and Others, E. T. 14 Geo. 3; 6 Went. Prec. 443.
(*c*) Anon. Lofft, 253 ; R. *v.* Hunt, 1 Ld. Keny. 108.
(*d*) Prynn's Case, 5 Mod. 459 ; 1 Show. 106.
(*e*) Corporation of Bewdly's Case, Holt, R. 353.
(*f*) R. *v.* Parkyns, 3 B. & Ald. 668.
(*g*) Anon., 2 Barnard. 27.
(*h*) R. *v.* Gwilt, 11 A. & El. 587.
(*i*) *Ex parte* — Gent, 4 A. & El. 576, note.

The Court refused a similar application for an assault committed with the object, which was not attained, of forcing the applicant to sign a certain paper (*k*); but an information was granted for maliciously pressing the captain of a merchant ship to serve as a common seaman (*l*).

Provoking to breach of peace.

Informations have been granted for sending and for carrying a challenge (*m*); but an information was refused where the applicant had sent the first challenge (*n*) either to the person against whom he moved (*o*), or to some third person connected with him (*p*); also where the affidavit on which the motion was made contained unnecessary imputations on the defendant (*q*). The Court would not in such cases grant an information merely on a *primâ facie* case being made out (*r*). "It is an invariable principle in this Court," said Lord Denman, "not to grant a rule for a criminal information upon evidence which would not justify a grand jury in finding a true bill of indictment against the party for the same offence" (*s*).

Attacks on the administration of justice.

[* 23] *Libellous attacks on the administration of justice have usually been prosecuted by the Attorney-General *ex officio*, or have been regarded as contempts of Court and dealt with as such (*t*). However, in *R.* v. *Watson and Others* (*u*), the Court granted an information against the members of a corporation who had passed and inserted in their books a resolution that a Mr.

(*k*) Anon., 2 Barnard. 87.

(*l*) R. *v.* Webb, 1 W. Bl. 18.

(*m*) R. *v.* Morgan and Another, 1 Doug. 314. See also R. *v.* Younghusband, 4 N. & M. 850.

(*n*) R. *v.* Hankey, 1 Burr. 316.

(*o*) Ib.

(*p*) R. *v.* Larrieu, 7 A. & El. 277.

(*q*) R. *v.* Doherty, Arnold & Hodge's N. T. Rep. 16.

(*r*) *Ex parte* Williams, 5 Jur. 1133. See also R. *v.* Willett, 6 T. R. 294; R. *v.* Younghusband, 4 N. & M. 850.

(*s*) *Ex parte* Williams, *ubi supra*. An amusing case of an application for a criminal information is mentioned by Cole (p. 37), where the attorney of one side had written *without prejudice* to the attorney of the opposite side a letter threatening to horsewhip his client, on the first opportunity, because of certain insulting pleas of his. As to an alleged challenge of an ambiguous kind, see Prideaux *v.* Arthur, Lofft. 393.

(*t*) As to the treatment of libels as contempts, see 3 Inst. 174; Wilmot's Notes and Opinions, 253; R. *v.* White, 1 Camp. N. P. 359; Crawford's Case, 13 Q. B. 613; Van Sandau *v.* Turner, 6 Q. B. 773; R. *v.* Watson, 2 T. R. 199; Lechmere Charlton's Case, 2 My. & Cr. 316; *Ex parte* Jones, 13 Ves. 237; *Ex parte* Turner, 3 Mont. D. & De G. 523, 551, 558; Martin's Case, 2 Russ. & Myl. 674; Macgill's Case, 2 Fow. Ex. Pr. 404; Smith *v.* Lakeman, 26 L. J. 305 Ch.; Shaw *v.* Shaw, 31 L. J. Prob. 35; *Re* Mulock, 33 L. J. Prob. 205.

(*u*) 2 T. R. 199.

Watson (against whom a jury had found a verdict with large damages in an action for malicious prosecution, which verdict had been confirmed by the Court of Common Pleas,) was actuated by motives of public justice and voting him a sum of money to pay his expenses (*x*).

An information was refused for a libel on Horne Tooke, affirming his guilt on a charge (high treason) for which he had been tried and acquitted, as the alleged libel was contained in a report published by order of the House of Commons (*y*).

Informations have been granted for a conspiracy to gain a false verdict (*z*); for bribing a juror (*a*); for attempting to persuade a witness not to appear on a criminal trial (*b*); against the captain of a man of-war for refusing permission to a coroner and his jury to go on board to view the body of a sailor who had committed suicide (*c*); against a defendant on a criminal trial, who distributed handbills in the assize town for the purpose of influencing the jury in his favour (*d*). Attempts to defeat justice.

In *R.* v. *Dummer* (*e*) an information for perjury was refused because the question put was unfair.

Publications which tend to prejudice the hearing of a pending cause are dealt with summarily as contempts of Court (*f*).

* Publishing the preliminary proceedings be- [*24] fore a magistrate or coroner was formerly punishable by information, as tending to create a prejudice against the accused and to deprive him of the chance of a fair trial (*g*); but opinion has so far changed on this subject that not even a civil action will now lie for such a publication, provided it be fair and accurate (*h*).

(*x*) See also R. *v.* Lawson, 1 Q. B. 486.

(*y*) R. *v.* Wright, 8 T. R. 293.

(*z*) R. *v.* Opie & Others, 1 Saund. Rep. 300.

(*a*) R. *v.* Young, cited 2 East, 14, 16.

(*b*) R. *v.* Lawley, 2 Str. 904. Whether this information was *ex officio* or not does not appear from the report.

(*c*) R. *v.* Solgard, 2 Str. 1097.

(*d*) R. *v.* Jolliffe, 4 T. R. 285. Cf. R. *v.* Phillips, 3 Burr. 1564.

(*e*) 1 Salk. 374.

(*f*) See 2 Atk. 469; *Per* Wood, V.C., Tichborne *v.* Mostyn, L. R. 7 Eq. 57; 17 L. T. N. S. 7; Littler *v.* Thompson, 2 Beav. 129; Felkin *v.* Herbert, 9 T. L. N. S. 635; 33 L. J. Ch. 294; *Re* Cheltenham and Swansea Railway Carriage and Waggon Co., L. R. 8 Eq. 580; R. *v.* Clement, 4 B. & Ald. 218; Daw *v.* Eley, L. R. 7 Eq. 49; Onslow and Whalley's Case, L. R. 9 Q. B. 219; Skipworth's Case, *ib.* 230.

(*g*) R. *v.* Lee, 5 Esp. 123. R. *v.* Fisher, 2 Camp. 563, was an indictment for a similar offence.

(*h*) See Usill *v.* Hales, L. R. 3 C. P. D. 319, and the cases there referred to.

For bribery.

Informations have been granted for bribing and for attempting to bribe at elections, parliamentary (*i*) and municipal (*k*); also for attempting to obtain by bribery an office from the First Lord of the Treasury (*l*).

As to bribery at parliamentary elections, Lord Mansfield, delivering the judgment of the Court in *R.* v. *Pitt* (*m*), said: "We have not the least doubt but that the offence, notwithstanding the statute (2 Geo. 2 c. 24), still remains an offence at common law."

Other cases.

In *R.* v. *Norris and Others* (*n*), an information was granted for a conspiracy to raise the price of salt; Lord Mansfield remarking that if any agreement was made to fix the price of any necessary of life, the Court would be glad to lay hold of an opportunity, *from what quarter soever the complaint came* (*o*), to shew their sense of the crime; and he mentioned an indictment, upon [* 25] one of the *last home circuits, against the bakers of the town of Farnham for such an agreement. But an information would not be granted for a similar endeavour by an individual (*p*).

An information was, however, granted against an individual for spreading rumours to enhance the price of hops, persuading dealers, &c., not to take their hops to market and to abstain from selling for a long time, engrossing large quantities of hops by buying from many persons with intent to resell the same for an unreasonable profit, and thereby to enhance the price, and buying large quantities with like intent (*q*). Lord Kenyon, after referring with approval to the salt case just cited, said: "If, then, hops are become a necessary

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(*i*) See R. *v.* Isherwood, 2 Ld. Keny. 202; R. *v.* Taylor (for offering to buy votes), 12 Mod. 314. So long as 2 Geo. 2 c. 24 was in force the Court would not as a rule grant an information until after the expiration of the two years within which an action might be brought for the penalty of £500, recoverable under that statute against any person guilty of bribery at parliamentary elections: R. *v.* Pitt & Mead, 3 Burr, 1335; 1 W. Bl. 380; Combe *v.* Pitt, 3 Burr. 1586.

(*k*) R. *v.* Plympton (the election of a mayor), 2 Lord Ray. 1377; see also R. *v.* Spinnage, cited 1 W. Bl. 383; R. *v.* Mayor of Tiverton, 8 Mod. 186; R. *v.* Robinson (election of an alderman, where the information was refused on special grounds), 1 W. Bl. 541.

(*l*) R. *v.* Vaughan, 4 Burr. 2494.

(*m*) 1 W. Bl. 383.

(*n*) 2 Lord Keny. 300.

(*o*) It was objected in this case that the party applying for the information seemed himself to be in some respect faulty, and that the application proceeded from a selfish motive; but the objection was not listened to.

(*p*) R. *v.* Hilbers, 2 Chitt. Rep. 163.

(*q*) R. *v.* Waddington, 1 East, 142.

ingredient, though only for preserving the common drink of the people, they must be deemed a necessary of life and a victual, the engrossing of which, or committing any undue practices to enhance the price to the public, is an offence at common law . . . . I am perfectly satisfied that the common law remains in force with respect to offences of this nature"(*r*).

The Court granted an information (in 1733) against certain persons for forcing a woman to marry one of them against her will (*s*); also (12 Geo. 2.), for getting a young lady (who went voluntarily) out of the custody of her guardian assigned in Chancery, and marrying her, although the Court of Chancery had already committed the defendants for contempt (*t*); also (15 Geo. 2), for taking away a natural daughter under sixteen from the care of her putative father, the Court being of opinion that it was within sect. 3 of 4 & 5 P. & M. c. 8 (*u*).

Where a music master, to whom a young girl had been bound apprentice by her father, assigned her to another person, nominally to learn music of him, but in reality to live with him as his mistress, the Court made absolute a rule for an information against the person to whom she was assigned, the music master, and the attorney who drew the assignment (*x*).

* In *R.* v. *Green* (*y*), the Court granted a rule [* 26] for an information against six persons for a conspiracy in taking away from his father's house a young man of fortune (aged 17), though not heir apparent to his father, and marrying him to one of the defendants, a widow of 35. In the report of this case a number of unreported cases are referred to where the Court granted informations for taking away or conspiring in taking away young girls and marrying them, and one case for taking away from the custody of his guardian a man who was *non compos*, and marrying him to one of the defendants.

Offences by holders of public offices.

Informations have been granted against persons holding public offices, for misdemeanors in relation to the duties of their offices :—

County Court Judges.—In *R.* v. *Marshal* (*z*) the Court was clearly of opinion that a judge who maliciously obstructed the course of justice was guilty of a

(*r*) Id. pp. 157, 158.
(*s*) R. *v.* Lynn, 2 Barnard. 242.
(*t*) R. *v.* Ossulton and others, 2 Str. 1107.
(*u*) R. *v.* Cornforth, 2 Str, 1162.
(*x*) R. *v.* Delaval, 3 Burr. 1434 ; 1 W. Bl. 410.
(*y*) 3 Doug. 36.
(*z*) 4 El. & Bl. 475.

misdemeanor for which an information would be granted; but the rule in that case was discharged on the ground that the applicant had already elected another remedy, by memorializing the Lord Chancellor.

A rule was refused for an information against a county court judge for committing a debtor to prison without allowing him to give any explanation, there being nothing to shew a corrupt motive (*a*).

Magistrates.—Though an indictment will lie against a magistrate for doing any illegal act (*b*), an information will not be granted unless it is also shewn that he has acted from some dishonest, corrupt or oppressive motive (*c*), under which description, says Abbott, C. J. (*d*), fear and favour may generally be included.

In respect of an illegal act the result of honest error an information will not be granted; for, in the words of the learned judge just referred to, "to punish as a criminal any person who, in the gratuitous exercise of a public trust, may have fallen into error or mistake belongs only to the despotic rulers of an enslaved peo- [* 27] ple, * and is wholly abhorrent from the jurisprudence of this kingdom" (*e*). Such also was the opinion of Lord Mansfield as to justices: "If their judgment is wrong, yet their heart and intention pure, God forbid that they should be punished; and he declared that he should always lean towards favouring them, unless partiality, corruption, or malice shall clearly appear" (*f*).

If an order *nisi* has been granted, the Court will discharge it on seeing that the magistrate did not act from the corrupt motives charged (*g*); but if he has acted illegally, the Court may make him pay the costs (*h*).

But it is not necessary to shew a corrupt motive, in the ordinary sense of the word corrupt; if a magistrate acts from "passion or opposition," that is, according to Ashurst, J. (*i*), "equally corrupt as if

(*a*) Anon. 16 Jur. 995.

(*b*) R. *v.* Sainsbury, 4 T. R. 457 (per Ashurst, J.)

(*c*) *Ex parte* Fentiman, 2 Ad. & El. 127; R. *v.* Jackson, 1 T. R. 653; R. *v.* Borron, 3 B. & Ald. 432; R. *v.* Justices of Staffordshire, 1 Chitt. R. 217.

(*d*) R. *v.* Borron, 3 B. & Ald. 434; see also Anon. 16 Jur. 995.

(*e*) 3 B. & Ald. 434.

(*f*) R. *v.* Young, 1 Burr. 562.

(*g*) R. *v.* Baylis, 3 Burr. 1318; R. *v.* Young, 1 Burr. 556; see also R. *v.* Athay, 2 Burr. 653, where though the defendant was not regularly summoned, he had been sent for by the magistrate, appeared before him, and so far from offering a defence applied for mercy: R. *v.* Badger, referred to, *post*, p. 28.

(*h*) R. *v.* Whately, 4 M. & Ry. 431.

(*i*) R. *v.* Brooke and Others, 2 T. R. 195.

they acted from pecuniary considerations." Thus, where certain persons who had been duly committed for fourteen days by a magistrate under the Vagrant Act (17 Geo. 2 c. 5), were, on giving bail to appear at the next quarter sessions to prosecute an appeal, discharged from custody by certain other magistrates, the Court made absolute a rule for an information against the latter magistrates, their action being considered "gross misbehaviour, which could not be imputed to mistake or ignorance of the law" (*k*).

It must first be clearly shewn that the magistrate has acted illegally (*l*); but the applicant for an information against him must not rely on the illegality being so manifest that the magistrate must have known of it; a corrupt motive (in the sense above described) must be charged and shewn (*m*).

Informations have been granted against magistrates in the following cases:—for refusing to grant licenses to those publicans who had voted, at the election of members for the borough, against the candidates recommended by the magistrates, the magistrates having, before the election, threatened to withhold licences from those who * should so vote (*n*); for refusing a [* 28] licence to sell ale to an innkeeper merely from a motive of resentment against him for having joined in an affidavit made in support of the interest [the report does not say of what kind] adverse to that espoused by the justices and their friends (*o*); for improperly granting an ale licence to a person to whom the general meeting of magistrates had refused a license on the ground of misbehaviour (*p*); for granting a distress warrant, in order to serve election purposes, against the occupiers of a house for poor rates, after the landlord had tendered the amount to the overseers (*q*); for causing a

(*k*) Id. 195.
(*l*) R. *v.* Barker, 1 East, 186; R. *v.* Jackson, Lofft. 147.
(*m*) R. *v.* Jackson, 1 T. R. 653.
(*n*) R. *v.* Williams, 3 Burr. 1317.
(*o*) R. *v.* Hann & Price, 3 Burr. 1716.
(*p*) R. *v.* Holland & Foster, 1 T. R. 692. In this case, one magistrate, who had been present at the general meeting at which the license was refused, induced another, who had not been present, to concur with him in granting the license, by misrepresenting the reason why it had been refused. The rule, as to the magistrate thus deceived though not blameless, was discharged on his paying the costs: it was made absolute against the other. R. *v.* Filewood, 2 T. R. 145, was also for improperly granting an ale licence, but no details are given in the report. Cf. R. *v.* Sainsbury, 4 T. R. 451, a case of indictment for a similar offence.
(*q*) R. *v.* Cozens, Doug. 426.

woman to be publicly whipped as a disorderly person, without any view, information, or proof exhibited against her (*r*); for causing a person to be imprisoned for want of bail, in a matter not cognizable before a justice, and ordering him to be kept in close confinement, without pen, ink, or paper, or the sight of any friend (*s*); for wrongfully refusing, on political grounds, as bail persons unquestionably of sufficient property (*t*); for knowingly taking insufficient sureties for the appearance of a person charged with seducing manufacturers to go into foreign parts, without notice to the committing justice (*u*); for fraudulently refusing to relieve burgesses appealing against a poor rate (*x*); for refusing to put 1 Geo. 1. c. 13 s. 11, the law against re-
[* 29] cusancy, in * force against a person because he was a gentleman of fashion and not suspected to be against the government (*y*); for wilful absence on the part of a justice from sessions which could not be held without him (*z*); for sitting as one of the justices under 12 Ann. c. 18 to settle the amount of salvage of a vessel, of which salvage he was, as custom-house officer, entitled to a part, under the statute (*a*).

An information would be granted against a justice for extortion under cover of his office (*b*); also for appointing overseers from a corrupt and improper motive (*c*).

In *R.* v. *Spotland* (*d*) an information was granted against justices for making a false return to a mandamus; but in the subsequent case of *R.* v. *Justices of Lancashire* (*e*), the Court expressed a doubt whether

(*r*) 2 Chitt. Cr. L. 236.

(*s*) Id. p. 238. See R. *v.* Saunders, 10 Q. B. 484.

(*t*) R. *v.* Badger, 4 Q. B. 468; 6 Jur. 994; 7 Jur. 261. The magistrates refused on the ground that the proposed bail (Birmingham town councillors) were chartist leaders, the charge against the accused being one of sedition. It appearing on cause being shewn against the rule, that the magistrates acted only in pursuance of a resolution previously come to before a general meeting of the magistrates of the county, with the sanction of the lord lieutenant, the Court discharged the rule, but the magistrates had to pay the costs, as their refusal of bail merely on the ground of personal character or opinions was illegal.

(*u*) 4 Went. Prec. 418.

(*x*) R. *v.* Phelps, 2 Ld. Keny. 570.

(*y*) R. *v.* Newton, 1 Str. 413.

(*z*) R. *v.* Fox, 1 Str. 21. (*a*) R. *v.* Davis, Lofft, 62.

(*b*) R. *v.* Yea, cited 1 Gude's Crown Practice, 111 note. See also R. *v.* Jones, 1 Wils. 7.

(*c*) R. *v.* Justices of Somersetshire, 1 D. & Ry. 443; R. *v.* Jolliffe, cited *arguendo*, 1 East, 154.

(*d*) Cases temp. Hard. 184; cf. R. *v.* Pettiward, 4 Burr. 2451.

(*e*) 1 D. & Ry. 485. The subject of false returns will be further considered when treating of Mandamus.

an information should be granted in such a case, unless the return was corruptly and wilfully false.

A rule nisi was granted against a justice for neglecting his duty as a county magistrate by refusing to call in the military or to establish a sufficient force to repress a riot at an election; but the rule was discharged because the requisite notice had not been given (*f*).

An information will not be granted against a magistrate for convicting unless the applicant swears in his affidavit that he is innocent of the charge against him (*g*); nor for returning to a writ of certiorari a conviction in another and more formal shape than that in which it was originally drawn up, of which a copy had been delivered to the party convicted by the magistrate's clerk, the conviction returned being warranted by the facts (*h*); nor against justices acting in sessions, where they are a court of record, except in a very strong case indeed, with flagrant proofs of their having acted from corrupt motives (*i*).

* An information was refused against a magis [* 30] trate for an assault committed by him on an attorney who had several days previously conducted certain proceedings against him before other magistrates, the assault not being committed by him in his public and magisterial, but in his private capacity (*k*).

Holders of other public offices.—In one case (*l*) an information was granted for refusing to undertake the office of sheriff, because the vacancy of the office occasioned a stop of public justice, and the year would be nearly expired before an indictment could be brought to trial. But the Court refused an information in a similar case against a dissenter, chosen sheriff of London, who had a conscientious objection to taking the sacrament according to the rites of the Church of England, there being another and a civil way of obliging persons to serve the office, viz., by proceeding for the penalties imposed by acts of common council upon refusers (*m*); also in a case where a person who did not

(*f*) R. *v.* Heming, 5 B. & Ad. 666.

(*g*) R. *v.* Webster, 3 T. R. 388. See also R. *v.* Athay, 2 Burr. 653.

(*h*) R. *v.* Barker, 1 East, 186.

(*i*) R. *v.* Justices of Seaford, 1 W. B. 432. See also R. *v.* Justices of Shrewsbury, 2 Barnard, 272.

(*k*) R. *v.* Arrowsmith, 2 Dowl. N. S. 704; s. c. *nom. Ex parte* Lee, see 7 Jur. 441. For a curious application (unsuccessful) against a magistrate for pretending to read the Riot Act, see R. *v.* Spriggins, 1 W. Bl. 2.

(*l*) R. *v.* Woodrow, 2 T. R. 731.

(*m*) R. *v.* Grosvenor, 1 Wils. 18; 2 Str. 1192; see also R. *v.* Shacklington, Andr. 201, note.

usually reside in a borough, and whose business obliged him to be abroad for months at a time, refused to undertake the office of mayor, the corporation, in this case, having also, by their charter, another remedy by fine (*n*); and in a case where a man refused to be sworn on a coroner's jury, under a *bonâ fide* belief that before being sworn the jury might inquire whether it was necessary to hold an inquest at all (*o*).

In *R.* v. *Harris* (*p*), an information was granted against certain aldermen of Gloucester for improperly refusing to admit several persons to their freedom of the city.

An information was granted, E. T., 5 Geo. 2, against an overseer who with others had forcibly removed a poor woman, who was very sick and near her confinement, from one parish to another, in order to save the expense it might occasion to the first parish if the child should be born there (*q*).

An information was granted in 1759 against over- [* 31] seers for * conspiring to bring about the marriage of a female pauper chargeable to their own parish in order to ease it and burthen another parish (*r*), and in 1767 against a single overseer for a like offence (*s*); but in 1783, for a precisely similar offence, the Court refused to grant an information against overseers and others, Lord Mansfield remarking that "great inconvenience has been felt from the practice of obliging persons in low circumstances to shew cause against informations. . . . To be sure, this appears to be a very fit subject for prosecution; but justice may effectually be done otherwise; and it will be more proper in all such cases to take the common remedy and proceed by indictment" (*t*); and in *R.* v. *Jennings* (*u*) in 1845, an information was refused against overseers for endeavouring to induce paupers fraudulently to remove to another parish.

An information was granted in 1733 against the clerk of a market for exacting fees to which he was not entitled (*x*).

An application for an information against an attor-

(*n*) R. *v.* Denison, 2 Lord Keny. 259.
(*o*) R. *v.* Blurton, 2 Jur. 33.
(*p*) 3 Burr. 1330.
(*q*) R. *v.* Busby, 1 Bott. 335, pl. 406 (Ed. 5).
(*r*) R. *v.* Herbert, 2 Lord Keny. 466; R. *v.* Watson, 1 Wils. 41.
(*s*) R. *v.* Tarrant, 4 Burr. 2106.
(*t*) R. *v.* Compton, Caldec. 246.
(*u*) 2 D. & L. 741.
(*x*) Anon. 2 Barnard. 310; s. c. nom. R. *v.* Robe, 2 Str. 999.

ney for practising as such whilst he was under-sheriff was refused (in 1745), because the affidavit did not state what particular acts he did, so that the Court might judge whether such acts amounted to practising as an attorney (*y*); Lee, C.J., adding that an information had been granted against one Husk for a like offence.

Leave to file an information against a gaoler for suffering a person committed on an attachment for non-payment of costs to go at large, was refused, the Court saying that the ordinary remedy by an action for the escape was sufficient (*z*).

R. v. *Rogers* (*a*) stands on a peculiar footing. There the Court granted (there being no other remedy) an information against commissioners under a Turnpike Act, on a charge of not pursuing the road mentioned in the Act, but going through part of another road, not meant to be repaired, for their own convenience. Lord Mansfield said: "Where trustees, appointed by Act of Parliament, appear plainly to have gone beyond their power, or have acted contrary to the evident meaning of the Act, though * they have not [* 32] done it from corruption, or partiality, this Court will (if there be no other way of setting the matter right) direct an information, not to punish them criminally (for the fine in such a case would be merely nominal, and for form), but in order to rectify the mistake. But then it must appear that somebody was aggrieved by such misconduct; and upon such grounds, if it be doubtful whether they have exceeded their power or not, the Court will, upon making such doubt appear to their satisfaction, order an information for the purpose aforesaid, and to hang over their heads till they have tried the civil right by feigned action or otherwise."

An information was granted in case of a false return to a mandamus to the Surgeons Company to choose officers. Holt, C.J., said: "The Court must proceed by way of information; for being a matter concerning public government, no particular person is so concerned in interest as to maintain an action; and the information must be granted against particular persons, though the return be under their common seal; for there is no other way to try the right" (*b*).

In *R.* v. *Upton St. Leonards* (*c*) the Court of

(*y*) R. *v.* Bull, 1 Wils, 93.
(*z*) R. *v.* Williams, Sayer, 145.
(*a*) 2 Lord Keny. 373.
(*b*) Case of the Surgeons Company, 1 Salk. 374.
(*c*) 10 Q. B. 827.

Queen's Bench, in 1847, granted a rule for an information against the inhabitants of a parish for non-repair of a road (on notice to be given to the churchwardens and surveyors of the highways of the parish) on affidavits stating that an indictment had been preferred at the assizes, that it was thrown out by the grand jury, two of whom were proprietors of land in the parish, that both took an active part against the bill, and that one of them, who had acted on behalf of the parish at an earlier stage of the dispute, told the foreman of the grand jury that the road was useless. Notwithstanding affidavits from these two gentlemen denying generally that they had taken an undue or active part in opposing the finding, the Court made the rule absolute. Lord Denman, delivering the considered judgment of the Court, said: "We do not impute any improper motives to those who interfered in the manner described, nor express any opinion on the merits of the case; but we think that their connection with the parishes in- [*33] dicted ought to have prevented them * from taking any part in the discussion whether the bills should be found by the grand jury. The statement of the inutility of the road, though it might be irrelevant, was not unlikely to influence the grand jury in their decision. . . . The circumstances appear to us to be so irregular, and so inconsistent with the due administration of justice, that this Court is bound in the exercise of its controlling power, to place the matter in a proper train for impartial investigation."

Offences committed abroad.

In a case, Mich. Term. 5 Geo. 2 (*d*) the Court refused an information for an offence (the report does not say of what kind) committed on the high seas, on the ground that an information is local. In the same report it is stated that an information was denied for a battery in Newfoundland (*e*). But this doctrine has not been applied to *ex-officio* informations (*f*).

Offence against the State.

A private individual will not be allowed to proceed by information where the offence which he seeks to punish is one against the State. An application was, on this ground, refused for a criminal information against a newspaper proprietor and publisher for articles inciting to breaches of the Foreign Enlistment Act. The Court were clear that there was no precedent for a private individual coming forward to institute

(*d*) R. *v.* Baxter, 2 Str. 918.
(*e*) R. *v.* Hooper, cited 2 Str. 918.
(*f*) See R. *v.* Stevens & Agnew, 5 East, 244, and R. *v.* Holland, 4 T. R. 437, cited *ante*, p. 6, note (*r*).

proceedings for an offence against the State: if there was any offence, it was for the Attorney-General, as the representative of Her Majesty, to take action. The applicant might proceed by indictment if he liked, or bring the matter to the attention of the law officers, who would take proceedings if they thought fit (*g*).

Other grounds of refusal.

An information has been refused to a person libelled, where he has put himself into communication with the libeller for the purpose of retorting upon or obtaining redress from him (*h*); also where the persons libelled, a jury, had through their foreman published a recriminating letter, commenting in violent terms on the alleged libel (*i*).

* Informations have sometimes been refused [* 34] on the ground of the existence of some other adequate remedy, criminal or civil.

It was the opinion of Ashurst, J., in *R.* v. *Watson* (*k*), that an information should not be granted against the members of a corporation for mis-spending corporation moneys: application in such cases should be made to the Court of Chancery. And an information was refused against the surveyor of a public road for an unauthorized application of the funds deposited in his hands by the trustees of the road. "The defendant," said the Court, "might be liable to make good the money if he had wrongly applied it; but it was impossible to convert a civil into a criminal remedy, in the absence of any corrupt motive" (*l*). An information for embezzling moneys collected on a brief was refused (*m*), the prosecutors being referred to the ordinary remedy by indictment; also for refusing to collect money on a brief for fire, according to the Act 4 Ann. c. 14, the matter being of a public nature, wherein the revenue was concerned, besides which a penalty was given and a method for obtaining it (*n*); also for endeavouring forcibly to retake one's wife, contrary to articles, there being a proper remedy by civil proceedings if the articles were valid (*o*).

An information was refused for burying a body found in the Medway without sending for the coroner.

(*g*) *Ex parte* Crawshay, 8 Cox, C. C. 356.
(*h*) *Ex parte* Beauclerk, 7 Jur. 373.
(*i*) R. *v.* Lawson, 1 Q. B. 486; see also R. *v.* Proprietors of Nottingham Journal, 9 Dowl. 1042.
(*k*) 2 T. R. 204; cf. Anon. Lofft. 184.
(*l*) R. *v.* Friar, 1 Chitt. Rep. 702.
(*m*) R. *v.* St. Botolph, 1 W. Bl. 443.
(*n*) R. *v.* Ford, 2 Str. 1130.
(*o*) R. *v.* Vane, 1 W. Bl. 18; cf. R. *v.* Williams, Sayer, 145.

The Court considered this mode of proceeding too heavy a punishment for such a mistake (*p*).

An information for a nuisance in obstructing the arches of the bridge at Leeds was refused, in 1756, on the grounds that it did not appear that a request to abate it had been made, and that it had been long acquiesced in; the Court adding that if a bill had been preferred before the grand jury at the assizes, and the nuisance proved, and the jury had notwithstanding refused to find the bill, that might have been an inducement to the Court to grant the motion (*q*).

Informations have also been refused on the ground that the persons against whom they were applied for [* 35] were in low * circumstances, living in a remote part of the country, to whom it would be a great expense to come up to receive judgment (*r*).

Informations have been refused on the ground that the applicant has already elected to pursue a different remedy, as by taking out a warrant, in case of an assault, though the applicant offered not to take further proceedings on the warrant (*s*); or by commencing an action for the same offence, unless, at least, the plaintiff discontinued the action (*t*); or by memorializing the Lord Chancellor for the removal of a county court judge (*u*); also where the prosecutor had already indicted the defendant for the same offence, and the grand jury had found a bill, though it was quashed for insufficiency, as the prosecutor might still prefer another indictment (*x*).

But where the applicant had, on being assaulted, called a policeman and given his assailant into custody, without warrant, but on appearing before the magistrate declined to press the charge, saying he should take another remedy, he was held not to have elected his remedy so as to prevent him moving for an information (*y*).

In general, those who apply will be held disentitled to an information if they do not leave themselves wholly in the hands of the Court. "If," said Lord Denman, "in any way they make attacks on the parties against

(*p*) R. *v.* Proby, 1 Lord Keny. 250.

(*q*) R. *v.* Green, 1 Lord Keny. 379.

(*r*) *Per* Lord Mansfield, R. *v.* Compton, Cald. 246; Anon. Lofft. 155.

(*s*) *Ex parte* ———, 4 Ad. & El. 576, note; cf. R. *v.* Gwilt, 11 A. & El. 587; see also R. *v.* O'Gorman Mahon. 4 A. & El. 575.

(*t*) R. *v.* Fielding, 2 Burr. 719; 2 Lord Keny. 386. Where the fact of an action having been commenced appeared for the first time on the defendant's being brought up for sentence, the Court refused to pass sentence; R. *v.* O'Gorman Mahon. 4 A. & El. 575.

(*u*) R. *v.* Marshall, 4 El. & Bl. 475; 24 L. J. Q. B. 242.

(*x*) Anon. 8 Mod. 187.

(*y*) R. *v.* Gwilt, 11 A. & El. 587; 8 Dowl. 476.

whom they ask for our summary interference, they disentitle themselves to succeed in their application. There is no restrictive qualification on this rule, which has been again and again laid down in this Court" (*z*).

Informations have also been refused on the ground that the applicants were equally guilty with those against whom they applied. Thus, an information was refused to certain members of a gang of cheats and gamblers against other members for a conspiracy * to cheat them (*a*). [*36] The applicant should, in the words of Lord Mansfield (*b*), "come for an information with clean hands;" and he must be guilty of no suppression of the truth in his affidavit (*c*).

But this rule has not been acted upon where the matter was one materially affecting the public, *e.g.*, the conspiracy to raise the price of salt, referred to *ante*, pp. 24, 25, where Lord Mansfield said that the Court would grant an information, from what quarter soever the complaint came (*d*).

Where the applicant for an information against the defendant for sending a hostile message, stated in his affidavit that "the defendant had been dismissed from Her Majesty's service under circumstances which would, in the opinion of officers and gentlemen, disentitle him to make any appeal to the laws of honour, in a case where no offence was given," the Court discharged the rule because of these unnecessary imputations (*e*).

The general reasons for refusing informations have been thus summed up by Lord Mansfield (*f*):—Informations at common law (which are very ancient in this Court) were filed by the coroner, who did it upon application, as a matter of course. The statute (4 & 5 Wm. & M. c. 18) was, therefore, made to limit it; and other grounds there are by which the Court has limited itself: 1st. As to the merits of the person applying, for they may be under such circumstances as that the Court will not interpose to favour them. 2nd. The time of application; as to this, there is no precise number of weeks, months, or years; but if delayed, the delay must be reasonably accounted for: this consideration is more necessary in election contests than in others; there is ill blood enough without this addition to it. 3rd. The suspicious state of the case, *ex evidentiâ rei*. 4th The consequences of granting the information."

(*z*) R. *v.* Proprietors of Nottingham Journal, 9 Dowl. 1043.
(*a*) R. *v.* Peach, 1 Burr. 148. (*b*) Anon. Lofft. 315.
(*c*) R. *v.* Wroughton, 3 Burr. 1683.
(*d*) R. *v.* Norris, 2 Lord Keny. 300; cf. R. *v.* Steward, 2 B. & Ad. 12.
(*e*) R. *v.* Doherty, Arn. & Hodge's N. T. R. 16.
(*f*) R. *v.* Robinson, 1 W. Bl. 542.

[* 37] * CHAPTER IV.

PROCEDURE TO OBTAIN INFORMATION.

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Mode of application.

The application for a criminal information is to be made to a Divisional Court by a motion for an order *nisi* (*a*).

With the exception of *ex-officio* informations filed by the Attorney-General on behalf of the Crown, no criminal information is to be exhibited, received, or filed at the Crown Office Department, without express order of the Queen's Bench in open Court (*b*).

Notice.

Where an information is sought against a private individual, no notice of the intended application is necessary.

An application against a magistrate for misconduct as such must be preceded by notice to him; the object being that he should have an opportunity of shewing cause, if he thinks fit, against the application in the first instance.

The notice must contain a distinct statement of the grievances or acts of misconduct complained of, and must be served six days before the time named in it for making the application (*c*).

If any part of the misconduct charged against him is in his character of magistrate, he is entitled to the notice, though other misconduct be also charged (*d*).

It is not enough that the application is not in fact [* 38] made till six * days after the notice: the notice must name a day for the motion, not less than six days distant (*e*).

(*a*) C. O. R. 48. (*b*) Id. (*c*) Id.
(*d*) R. *v.* Heming, 5 B. & Ad. 666.
(*e*) *Ex parte* Fentiman, 2 Ad. & El. 127, in which case Lord Denman referred to *Re* Flounders, 4 B. & Ad. 865; see also Bolton *v.* Allen, 1 Dowl. N. S. 309.

In a case where due notice had been given but, on shewing cause, the rule was discharged because the affidavits had been sworn before the applicant's attorney, a renewed application on properly sworn affidavits was allowed, without any further notice to the justices (*f*).

If an order *nisi* has been granted without notice given to the magistrate, it will be discharged on this fact being brought to the knowledge of the Court (*g*).

Service of Notice.—As to service of notices in general, Lord Kenyon thus expressed himself (*h*): "In every case of the service of a notice, leaving it at the dwelling-house of the party has been deemed sufficient. So wherever the Legislature has enacted that, before a party shall be affected by any act, notice shall be given to him, and leaving that notice at his house is sufficient. . . . In general, the difference is between process to bring the party into contempt, and a notice of this kind, the former of which only need be personally served on him."

In the case of a magistrate, it is now expressly provided that the notice must be served personally upon him, or left at his residence with some member of his household (*i*).

Affidavit of Service.—In moving for an order *nisi* for a criminal information against magistrates, there must be an affidavit of due service of the six days' notice (*k*).

Adjournment for Notice.—If on the hearing of a motion or other application the Court or a judge is of opinion that any person to whom notice has not been given, ought to have or to have had such notice, the Court or judge may either dismiss the motion or application, or adjourn the hearing thereof, in order that such notice may be given, upon such terms, if any, as the Court or judge may think fit (*l*).

Fiat.

Sect. 3 of the Newspaper Libel and Registration Act, 1881, which * enacts that "no criminal prose- [*39] cution shall be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper, for any libel published therein, without the written fiat or allowance of the Director of

(*f*) R. *v.* Justices of Shrewsbury, 2 Barnard. 272.
(*g*) R. *v.* Heming, 5 B. & Ad. 666.
(*h*) Jones *v.* Marsh, 4 T. R. 465, dealing with a notice in ejectment.
(*i*) C. O. R. 47.
(*k*) 1 Gude, 115. For form of affidavit of service, see Appendix, *post*.
(*l*) C. O. R. 259.

Public Prosecutions in England, or Her Majesty's Attorney-General in Ireland, being first had and obtained," does not apply to informations filed by order of the Court (*m*).

Time within which application must be made.

There is, as a general rule, no fixed time within which the application for an information must be made; but it must be made within reasonable time. "There is," said Lord Mansfield (*n*), "no precise number of weeks, months or years; but if delayed, the delay must be reasonably accounted for."

By the new Crown Office Rules (No. 48) the application must be within a reasonable time after the offence complained of.

An application in January in respect of a libel published in the preceding May, but not heard of by the applicant till July, was held too late (*o*); so was an application in Easter term for an offence committed in the previous December (*p*).

The general rule acted on has been that the application should be made before the expiration of the second term after the offence, a sufficient time before the expiration to allow of cause being shewn within such second term (*q*); but where this was impossible, owing to the applicant not having known of the offence in time, the Court would accede to a proper application made after the second term, when the application was not against a magistrate or other public officer (*r*). If the applicant knew of the offence, the fact that he was abroad at the time was not considered a sufficient excuse for delaying beyond the fixed time (*s*).

In cases of application against magistrates or other public officers, the rule of practice has been that the [* 40] application must not be *later than the second term after the offence charged (*t*), even though an assize should have intervened (*u*).

(*m*) R. *v.* Yates, L. R. 11 Q. B. D. 750, *per* Field, Denman, and Mathew, JJ. (Lord Coleridge, C.J., and Hawkins, J., dissenting.)

(*n*) R. *v.* Robinson, 1 W. Bl. 542.

(*o*) R. *v.* Murray, 1 Jur. 37; see also R. *v.* Barry O'Meara, referred to 4 B. & Ad. 869, note.

(*p*) R. *v.* Hext, 4 Jur. 339.

(*q*) See *per* Wightman, J., in R. *v.* Harris, 13 L. J. M. C. 162. R. *v.* Yea, 1 Gude, 111, where it was held that an application could, without explanation of the delay, be made after the second term, has not been followed in the later cases.

(*r*) R. *v.* Jollie, 4 B. & Ad. 867.

(*s*) R. *v.* Editor of Satirist, 3 N. & M. 532.

(*t*) R. *v.* Harries, 13 East, 271.

(*u*) R. *v.* Saunders, 10 Q. B. 484.

In *R.* v. *Morice* (*x*) Lord Ellenborough at first thought that the application was too late, because not made within the first term next after the imputed offence; but, on reference to a case within the recollection of the Solicitor-General, and to the practice which had generally been understood to prevail, and was then recognized by the officers of the Crown Office in Court, viz., that applications of this kind had been received within two terms, the affidavits were suffered to be opened, and a rule *nisi* was granted.

In such cases the Court would not admit as an excuse for further delay that the applicant had only recently become aware of the acts complained of (*y*). "If we were to admit this excuse," said Abbott, C.J., "we should entirely frustrate the very useful rule to which we have been referred" (*z*).

In *R.* v. *Hartley* (*a*) the same rule was applied to paving commissioners; the Court thinking that public officers were entitled to the same protection as magistrates, and that the principle of the rule was the same.

It was held in *R.* v. *Marshall* (*b*), on an application made on the 9th of February against a magistrate for having refused an ale licence on the previous 24th of October, that a rule would not be granted so late in the second term after the alleged offence as to preclude the magistrate from shewing cause against it in the same term; but a rule was granted in *R.* v. *Smith* (*c*) at the end of a term for alleged misconduct during that term.

According to Littledale, J., it was a general rule that a motion for a criminal information could not be made on the last day of term (*d*); but the rule in *R.* v. *Smith* (*supra*) was granted on the 26th of November, the same day on which it was refused by Littledale, J.

Though terms are now abolished (*e*) it has been thought well to make reference to the foregoing cases, in illustration of the principles as to time on which the Court has acted in granting or refusing informations.

* There was one case where delay was held [* 41] not only reasonable but necessary, that is, where the information was for bribery at a Parliamentary election. The Court would not hear an application till after the lapse of the period within which a penal action could

(*x*) 13 East, 271, note (*a*).
(*y*) R. v. Bishop, 5 B. & Ald. 612.
(*z*) Ib.
(*a*) 4 B. & Ad. 869, note.
(*b*) 13 East, 322.
(*c*) 7 T. R. 80.
(*d*) *Ex parte* Tanner, 3 Jur. 10.
(*e*) Jud. Act. 1873, sect. 26.

be brought under 2 Geo. 2, c. 24, s. 11 (no longer in force) (*f*).

Affidavits.

Title.—The affidavits on which the order *nisi* is moved for should be entitled: "In the High Court of Justice, Queen's Bench Division" (*g*): they should not be further entitled; as, before the order *nisi* is granted, there is no cause or prosecution (*h*).

On reference to the officers of the Crown Office in 1794 (*i*) they certified that it was the practice of the Court to receive affidavits against a rule for a criminal information without any title until the rule was made absolute. In a previous case (*k*) the Court allowed affidavits entitled *R.* v. *J.* to be read on shewing cause against the rule *nisi;* being of opinion that once a rule had been granted there was a proceeding in Court between the sovereign and the defendant. In a note to this case, another case (*l*) is referred to where the Court held that the affidavits on shewing cause might be entitled or not; and this may be taken to be the rule.

A failure by reason only of the defective title of the affidavit would not prevent the Court from entertaining a renewed application on the same materials. "I have consulted the other judges," said Patteson, J., in a case of this kind (*m*), "and we are of opinion that the rule preventing a repetition of a particular application applies to cases where a party has come before the Court in the first instance with imperfect materials, others being in existence at the time; and not to cases where a rule has been discharged merely on the ground of the defective title of the affidavits in support of the application."

What may be disposed to.

Affidavits are to be confined to such facts as the witness is able of his own knowledge to prove; except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted.

[*42] *The costs of every affidavit which shall unnecessarily set forth matters of hearsay, or argumentative matter, or copies of or extracts from documents, shall be paid by the party filing the same (*n*).

(*f*) R. *v.* Pitt, 1 W. Bl. 380, decided on 2 Geo. 2, c. 24, s. 11, which made a penalty of £500 recoverable by a common informer.

(*g*) C. O. R. 7.

(*h*) R. *v.* Jones, 2 Str. 704; R. *v.* Almon, 6 T. R. 642, note.

(*i*) R. *v.* Harrison, 6 T. R. 60.

(*k*) R. *v.* Jones, 2 Str. 704.

(*l*) R. *v.* Robinson, 2 Str. 704, note.

(*m*) R. *v.* Jones, 8 Dowl. 307. See C. O. R. 19, on pp. 43, 44, *post.*

(*n*) C. O. R. 8.

Affidavits sworn in England must be sworn before a judge, district registrar, commissioner to administer oaths, first or second class clerk in the Crown Office Department, or officer empowered under the Rules of the Supreme Court to administer oaths (*o*). Before whom to be sworn.

Every commissioner to administer oaths shall express the time when, and the place where, he shall take any affidavit or recognizance; otherwise the same shall not be admitted to be filed without the leave of the Court or a judge; and every such commissioner shall express the time when, and the place where, he shall do any other act incident to his office (*p*). Time and place of swearing to be expressed.

All affidavits, declarations, affirmations, and attestations of honour in causes or matters depending on the Crown side may be sworn and taken in Scotland or Ireland or the Channel Islands, or in any colony, island, plantation, or place under the dominion of Her Majesty in foreign parts, before any judge, court, notary public, or person lawfully authorized to administer oaths in such country, colony, island, plantation, or place respectively, or before any of Her Majesty's consuls or vice-consuls in any foreign parts out of Her Majesty's dominions; and the judges and other officers of the High Court shall take judicial notice of the seal or signature, as the case may be, of any such court, judge, notary public, person, consul, or vice-consul, attached, appended, or subscribed to any such affidavits, affirmations, attestations of honour, declarations, or to any other document (*q*). Affidavits made abroad.

Every affidavit shall be drawn up in the first person, and shall be divided into paragraphs; and every paragraph shall be numbered consecutively, and as nearly as may be shall be confined to a distinct portion of the subject. Every affidavit shall be written or printed bookwise. No costs shall be allowed for any affidavit or part of an affidavit substantially departing from this rule (*r*). Form.

Every affidavit shall state the description and true place of abode of the deponent (*s*). Deponent's description and abode.

*In every affidavit made by two or more deponents the names of the several persons making the affidavit shall be inserted in the jurat; except that, if the affidavit of all the deponents is taken at one time by the same officer, it shall be sufficient to state that it was sworn by both (or all) of the "above-named" deponents (*t*). [*43] By more than one deponent.

(*o*) Id. 9.
(*p*) Id. 10.
(*q*) Id. 11.
(*r*) Id. 12.
(*s*) Id. 13.
(*t*) C. O. R. 14.

Filing.

Every affidavit used on the Crown side shall be filed in the Crown Office Department of the central office. There shall be indorsed on every affidavit a note shewing on whose behalf it is filed; and no affidavit shall be filed or used without such note, unless the Court or a judge shall otherwise direct (*u*).

Striking out scandalous matter.

The Court or a judge may order to be struck out from any affidavit any matter which is scandalous, and may order the costs of any application to strike out such matter to be paid as between solicitor and client (*x*)

Interlineations, &c.

No affidavit having in the jurat or body thereof any interlineation, alteration, or erasure shall, without leave of the Court or a judge, be read or made use of in any matter depending in Court, unless the interlineation or alteration (other than by erasure) is authenticated by the initials of the officer taking the affidavit, or if taken at the Crown Office Department, either by his initials or by the stamp of that office; nor in the case of an erasure, unless the words or figures appearing at the time of taking the affidavit to be written on the erasure are re-written and signed or initialled in the margin of the affidavit by the officer taking it (*y*).

Affidavits of illiterate or blind.

Where an affidavit is sworn by any person who appears to the officer taking the affidavit to be illiterate or blind, the officer shall certify in the jurat that the affidavit was read in his presence to the deponent, that the deponent seemed perfectly to understand it, and that the deponent made his signature in the presence of the officer. No such affidavit shall be used in evidence in the absence of this certificate, unless the Court or a judge is otherwise satisfied that the affidavit was read over to and appeared to be perfectly understood by the deponent (*z*).

Defect in title or other irregularity.

The Court or a judge may receive any affidavit sworn for the purpose of being used in any cause or matter, [* 44] notwithstanding any * defect, by misdescription of parties or otherwise, in the title or jurat, or any other irregularity in the form thereof, and may direct a memorandum to be made on the document that it has been so received (*a*).

Stamping.

In cases in which by the present practice an original affidavit is allowed to be used; it shall before it is used be stamped with a proper filing stamp, and shall at the time when it is used be delivered to and left with the proper officer in Court or in chambers, who shall send it to be filed (*b*).

(*u*) Id. 15. (*x*) Id. 16. (*y*) Id. 17.
(*z*) Id. 18. (*a*) C. O. R. 19. (*b*) Id. 20.

Office copy.

An office copy of an affidavit may, in all cases in which a copy is admissible, be used, the original affidavit having been previously filed, and the copy duly authenticated with the seal of the office (*c*).

Before whom not to be sworn.

No affidavit shall be sufficient if sworn before the solicitor acting for the party on whose behalf the affidavit is to be used, or before any agent or correspondent of such solicitor, or before the party himself (*d*).

Any affidavit which would be insufficient if sworn before the solicitor himself shall be insufficient if sworn before his clerk or partner (*e*).

Filing after time limited.

Where a special time is limited for filing affidavits, no affidavit filed after that time shall be used, unless by leave of the Court or a judge (*f*).

Order made before affidavit made and produced or filed.

Except by leave of the Court or a judge no order made *ex parte* in Court, founded on any affidavit, shall be of any force, unless the affidavit on which the application was made was actually made before the order was applied for, and produced or filed at the time of making the motion (*g*).

Additional affidavits.

Upon motions founded upon affidavits, either party may apply to the Court or a judge for leave to make additional affidavits, upon any new matter arising out of the affidavits of the opposite party; but no additional affidavits shall be used except such leave shall have been first obtained (*h*).

Affidavit of service.

Affidavits of service shall state when, where, and how and by whom, such service was effected (*i*).

Contents of affidavits.

The affidavits should be full and frank; every [*45] material fact should be set forth.

Where the affidavit on which a rule had been granted for an information against a magistrate, for refusing to take the examination of two persons on a charge against a third person, made no mention of the fact that the magistrate stated his perfect willingness to investigate the charge submitted to him if directed to do so by the King's Bench, Abbott, C.J. said that if the offer to investigate the charges, in case the Court should direct the magistrate to do so, had been disclosed by the affidavit of the applicant, most undoubtedly the Court would not have granted a rule for a criminal information: "The suppression of the offer necessarily leads us to discharge the rule with costs, according to the usual practice in cases of this kind" (*j*).

(*c*) Id. (*d*) Id. 21. (*e*) Id. 22. (*f*) Id. 23.
(*g*) Id. 24. (*h*) Id. 25. (*i*) Id. 27.
(*j*) R. *v.* Borron, 3 B. & Ald. 437, 438. See also R. *v.* Athay,

The affidavits should avoid all unnecessary and irrelevant charges, and especially any scandalous matter.

In *R.* v. *Burn* (*k*) Lord Denman said: "The prosecutor has stated a sufficient case for a criminal information; but he has, in the early part of his affidavit, introduced words irrelevant and reflecting on the character of the party against whom he applies; and afterwards, in explanation of something which he states to have passed, he goes into a narrative of matters impertinent to the cause, and calculated only to prejudice the minds of the Court. Parties who come before the Court with affidavits are to confine themselves to the simplest statement of that which induces them to make the application, and are not to enter upon discussions like this, unless the nature of the subject renders them absolutely necessary. And we must say here that the spirit which has been shewn in framing the affidavit makes us doubt whether the spirit evinced by the prosecutor, at the time when this party came before him, was not such as might lead to what is now complained of. The Court cannot make the rule absolute."

They must satisfactorily account for any delay in making the application (*l*); mere absence abroad not [*46] being a sufficient *excuse (*m*). "It has been the persuasion," said Lord Denman, "that an affidavit cannot be made abroad as a foundation for a criminal information. We think, however, that if that question should come under our consideration such an objection would not prevail" (*n*).

On the subject of delay generally, see the remarks already made *ante*, pp. 39, 40.

An exculpatory affidavit from the person complaining is almost always necessary (*o*).

Exceptions have been made in the following cases: (1) where the charge was only general, as a libellous charge of sodomitical practices (*p*), or a libel stating that a nobleman and his family were held in such general abhorrence in the Isle of Man that, if he should suc-

2 Burr. 653, *ante*, p. 27; R. *v.* Wroughton, 3 Burr. 1683; and see *per* Lord Tenterden, C.J., in R. *v.* Hughes, 7 B. & C. 719.

(*k*) 7 A. & El. 193; an application by a magistrate for slanderous words spoken of and addressed to him.

(*l*) R. *v.* Jollie, 4 B. & Ad. 867; and cases referred to in the note.

(*m*) R. *v.* Editor of Satirist, 3 N. & M. 532.

(*n*) Ib.

(*o*) R. *v.* Athay, 2 Burr. 653; R. *v.* Haswell, 1 Doug. 387; R. *v.* Webster, ib., note; R. *v.* Bickerton, 1 Str. 498; R. *v.* Miles, 1 Doug. 284.

(*p*) R. *v.* Dennison, Lofft. 148.

ceed in obtaining an Act then depending in Parliament, it would occasion a revolt (*q*); (2) when the party was abroad (*r*); (3) where the charge was against a public body of men, *e.g.*, the clergy of a diocese (*s*); (4) where the matter was one materially affecting the public; *e.g.*, a conspiracy to raise the price of salt (*t*).

Where an exculpatory affidavit is necessary, the applicant must explicitly negative the charge against him. If he moves against a magistrate, for having wrongfully convicted him, he must distinctly swear to his innocence of the offence charged (*u*); if the offence is in respect of a libel, he must expressly deny the truth of all the imputations contained in it (*x*).

Where an alleged libel charged the presiding officer at a school board election with partiality in the manner in which he discharged his duty, and mentioned one specific instance where he had rejected the vote of a duly qualified female voter, who was politically opposed to him, the Court discharged with costs a rule obtained by the presiding officer, because his affidavit, though it * denied generally the truth of all the charges, [* 47] and also denied that he had refused any vote on political or improper or illegal considerations, did not specifically negative the charge relating to the vote of the female voter (*y*).

The applicant must come into Court with clean hands (*z*). In a case, however, of a libel reflecting on several persons, the Court granted an information, though the person moving for it was not himself blameless (*a*). The Court also dispensed with an exculpa-

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(*q*) 1 Doug. 390, note.

(*r*) *Per curiam*, R. *v.* Wright, 2 Chitt. R. 162.

(*s*) R. *v.* Williams, 5 B. & Ad. 595, other similar cases being referred to *arguendo*. Cf. R. *v.* Gregory, 8 A. & El. 907.

(*t*) R. *v.* Norris. 2 Ld. Ken. 300; R. *v.* Steward. 2 B. & Ad. 12.

(*u*) R. *v.* Athay, 2 Burr. 653; R. *v.* Webster, 3 T. R. 388.

(*x*) R. *v.* Bickerton, 1 Str. 498; R. *v.* Miles, 1 Doug. 284; R. *v.* Taylor, 1 Jur. 53; R. *v.* Haswell, 1 Doug. 387.

(*y*) R. *v.* Aunger, 28 L. T. N. S. 630. In this case Blackburn, J., said : "All persons in the position of relators are, according to the practice which has existed for a long time, bound to satisfy the judges, who do not act on technical rules at all, but as men of the world and men of common sense, upon affidavits that they themselves are free from blame, and are fit and proper persons to be entrusted with the prerogative of this Court; and they are to do that in the teeth of the other side, who have an opportunity on affidavit of persuading the Court, if they can, that such persons are not so."

(*z*) Anon. Lofft. 315 ; R. *v.* Eden, Lofft. 72 ; R. *v.* Wroughton, 3 Burr. 1683.

(*a*) R. *v.* Gregory, 8 A. & El. 907.

tory affidavit where the libel was on a public body of men, *e.g.*, the clergy of a diocese (*b*). And where the offence charged was one against the public interests, as bribery in the election of an alderman, who would as such be a justice of the peace, the Court granted a rule on the the sole testimony (uncontradicted) of a *particeps criminis* (*c*).

The affidavits of the applicant should be as clear, as numerous, and as strong as possible, in the first instance, for reasons which will appear *post*, p. 51.

They must afford such evidence against the defendant as would warrant a grand jury in finding a true bill (*d*). Thus it was held not sufficient to swear, not from the deponent's own knowledge, but from the information of other persons, that certain libellous writings were in the handwriting of the defendant (*e*). So an affidavit of the prosecutor and two other persons [*48] that a challenge * was delivered to the prosecutor by one of the defendant's clerks, who refused to make an affidavit of the fact, was held insufficient, as not legal evidence. The Court said that "in these cases they were placed in the room of a grand jury; that if a bill of indictment were preferred before a grand jury, the affidavit or the oaths of these persons of what the clerk had said would not be legal evidence against the defendant; and that this Court could only grant an information on evidence that would support a bill of indictment; that if they were to grant a rule calling on the defendant to shew cause why an information should not be filed against him, it would be calling on him either to give evidence (on the shewing cause) against himself, or leaving the rule to be made absolute on this affidavit alone, which was not legal evidence" (*f*).

Where, on moving for an information for a newspaper libel, the affidavit stated that the defendant, "the printer of a newspaper called the *Standard*, on the 8th day of November instant, did insert and print in the said newspaper a certain scandalous and defamatory libel relat-

(*b*) R. *v.* Williams, 5 B. & Ald. 595.

(*c*) R. *v.* Steward, 2 B. & Ad. 12.

(*d*) *Per* Cur. R. *v.* Willett, 6 T. R. 294.

(*e*) *Ex parte* Williams, 5 Jur. 1113. "In R. *v.* Willett the rule was refused, because the statement in the affidavit of what the deponent had been informed was not legal evidence. . . . So that the *ratio decidendi* of that case was, that an affidavit made on information or belief was not sufficient evidence to call upon the other side to make an answer to the charge. The same principle was acted on in *Ex parte* Williams."—*Per* Blackburn, J., R. *v.* Stanger, L. R. 6 Q. B. 355.

(*f*) R. *v.* Willett, 6 T. R. 294.

ing to this deponent in his office of mayor, &c., and a copy of which said libel is hereunto annexed," &c., this was held insufficient (*g*). "There should," said Lord Denman, "be proof of publication by the defendant distinctly given. If the affidavits offered here did contain *primâ facie* evidence, I do not think we should be satisfied with it where conclusive evidence is so easily attainable." Patteson, J., added: "There is an express statutory provision (*h*) as to the proof in such cases. If parties will not adopt that, they must shew publication by some direct proof, as that a party bought the libel in the defendant's shop."

The fact that the affidavits of the other side admitted the publication was held by the Court, in the case just referred to, not to cure the insufficiency of the applicant's affidavits (*i*). But in the later case of *R.* v. *Stanger* (*k*) the Court took, on this point, a different view. After referring to Lord Kenyon's language * in [* 49] *R.* v. *Mein* (*l*), viz., "Upon conference with my brothers I find that it is not unusual to have recourse to the affidavits against the rule in order to come (if possible) at the whole truth of the transaction," and to the distion drawn by Cole (*m*) between an application for a *quo warranto* (*n*), which is considered in the nature of a civil proceeding, and an application for a criminal information, Blackburn, J., said: "The distinction which he makes between a criminal and civil proceeding is not, I think, a sound one. In either case, whether the application be for a criminal information or a writ of *quo warranto*, we are acting under the statute (4 & 5 Wm. & M. c. 18); and the question would be, are the facts such as make it right for the Court to grant the application. I think the rule laid down in *R.* v. *Mein* is the sounder. But in the present case it is not necessary to decide the point, for the defendant's affidavit says nothing as to his being the publisher; and according to *R.* v. *Willett* (*o*) he cannot be called upon to answer so as to supply evidence against himself."

(*g*) R. *v.* Baldwin, 8 A. & El. 168.

(*h*) 6 & 7 Will. 4, c. 76, the whole of which Act is repealed by 33 & 34 Vict. c. 79. See now the Newspaper Libel and Registration Act of 1881 (44 & 45 Vict. c. 60), which establishes a register of newspapers, in which the names and addresses of the proprietors are to be entered, and copies of entries in or extracts from which are made evidence, ss. 8, 9, 15.

(*i*) R. *v.* Baldwin, *ubi supra*.

(*k*) L. R. 6 Q. B. 352. (*l*) 3 T. R. 597.

(*m*) Informations, p. 52.

(*n*) R. *v.* Mein was a case of this kind.

(*o*) 6 T. R. 294.

In *R.* v. *Stanger* (*p*) the affidavit stated that a copy of the newspaper had been bought at the publishing office of the paper, and that by a footnote printed at the end of the said newspaper, John Stanger was stated to be the printer and publisher thereof. The rule was discharged on the ground that the prosecutor's affidavits did not contain any evidence of a publication of the libel by the defendant.

In a case of newspaper libel, the newspaper should be annexed to the affidavit and marked as an exhibit (*q*).

On an application in respect of a challenge, an affidavit setting forth verified copies of the letters containing the challenge was held sufficient (*r*).

On an application against a magistrate for his conduct as such, except where *res ipsa loquitur*, it has been held that the affidavit should state the belief of the applicant that the magistrate acted from a corrupt or improper motive (*s*). "There must either be," said Holroyd, J., "such circumstances as can, by possibility, [* 50] lead * but to one conclusion, or there must be, if only suspicious circumstances be stated, the apprehension and belief of the party applying that improper motives operated on the defendants" (*t*). It was held not sufficient, in a case of the latter kind, to charge that the defendants acted illegally (*u*).

No. 48 of the New Crown Office Rules now provides that in applications against a justice of the peace for misconduct in his magisterial capacity, the applicant must depose on affidavit to his belief that the defendant was actuated by corrupt motives, and further, if for an unjust conviction, that the defendant is innocent of the charge.

The Court refused to hear a motion against a magistrate for convicting without a summons until the conviction was removed before them (*x*).

The Court refused an information against a clergyman for perjury on his admission to a living, on an affidavit alleging that the presentation was simoniacal, till he had first been convicted of the simony (*y*).

An application against an attorney for practising as such whilst under-sheriff, was refused because the affi-

(*p*) *Ubi supra.*
(*q*) R. *v.* Woolmer, 12 A. & El. 422.
(*r*) R. *v.* Chappel, 1 Burr. 402.
(*s*) R. *v.* Williamson, 3 B. & Ald. 582.
(*t*) R. *v.* Williamson, 3 B. & Ald. 582.
(*u*) R. *v.* Jackson, 1 T. R. 653.
(*x*) R. *v.* Heber, 2 Str. 915.
(*y*) R. *v.* Lewis, 1 Str. 70.

davits did not mention what particular acts he did as attorney, of which the Court should be in a position to judge (*z*).

In application against magistrates there should be an affidavit that the requisite notice has been given (*a*).

Where the trial of a criminal information was postponed on the ground that the defendant had distributed handbills in the assize town tending to prejudice the trial, the affidavit on which the judge at the assizes had postponed the trial was held sufficient to enable the Court to grant another information against the same defendant (*b*). "All that is required in an affidavit," said Lord Kenyon, C.J., "as the foundation for a criminal information, is that which is required in every other cause, that the affidavit be made in a judicial proceeding, where the party swears at the hazard of a prosecution for perjury if it be false. Now these affidavits were taken before a judge, who had authority to administer an oath; * they were made in the course [* 51] of a judicial proceeding, and relevant to the material point in issue. And the original affidavits are now before us on the files of the Court; for they were transmitted here by the officer of the Court below."

Renewed application on amended affidavits.

"The rule is express that a party who has a full opportunity of bringing his case before the Court must do so in the first instance. If he neglects the means of doing so, he cannot be allowed to come again and put the other party to the trouble and expense of a second attendance" (*Per Curiam*, *R.* v. *Inhabitants of Barton* (*c*)).

On this ground, after an order nisi for an information has once been discharged (without any collusion or improper conduct on the part of the defendant), whether on the ground of insufficiency of materials or of conflicting affidavits, the Court will not hear a second application on additional affidavits (*d*). According to Lord Denman (*e*): "The rule is, that when affidavits have been answered, the party moving is not entitled to file others in reply; but that would, in effect,

(*z*) R. *v.* Bull, 1 Wils. 93.

(*a*) See R. *v.* Rae, 8 Ir. Rep. C. L. 524.

(*b*) R. *v.* Jolliffe, 4 T. R. 285.

(*c*) 9 Dowl. 1022.

(*d*) R. *v.* Smithson, 4 B. & Ad. 861; cf. R. *v.* Manchester and Leeds Railway Co., 8 A. & El. 413 (an application for a *certiorari*); R. *v.* Harland, 8 Dowl. 323 (an application for an attachment); Saunderson *v.* Westley, 8 Dowl. 652; Rossett *v.* Hartley, 7 A. & El. 522, note; R. *v.* Orde, 8 A. & El. 420, note (a case of *quo warranto*); *Ex parte* Hasleham, 1 Dowl. N. S. 792.

(*e*) R. *v.* Smithson, *ubi supra.*

be done if we allowed the course now proposed. A party moving for a criminal information has some great advantages, and he may reasonably be required to collect all the necessary materials for his application when he first makes it. It is not suggested here that the party moved against has been guilty of any collusion or other improper conduct to obtain the dischage of the rule, but only that the prosecutor has been, in the first instance, less amply supplied with materials than he might have been. I think we ought not to grant the rule on such a ground."

And the Court has refused in such a case to enlarge the order *nisi* in order that the defects in the affidavits might be supplied (*f*), even where the only defect was that the place where the deponent was sworn was not mentioned in the jurat (*g*).

The rule, however, is not without some exceptions. Where a rule for an information had been discharged [* 52] merely on the ground * that the affidavits of the applicant had been sworn before his attorney, the Court allowed a second application on properly sworn affidavits (*h*). And where the defect was merely in the title of the affidavits, Patteson, J., after consulting the other judges, held that the rule above stated did not apply, and that a new application on properly entitled affidavits might be made (*i*).

Where the deficiency was in the affidavit on which the order nisi was moved for, the Court has allowed the application to be renewed on better affidavits (*k*). But unless leave to renew the application be given in the first instance, a second application on amended affidavits will not be allowed (*l*).

R. v. *Eve and Another* (*m*) was a peculiar case. There a rule for an information for a libel, which had been obtained on the sole affidavit of the applicant, was discharged on the sole affidavit of one S., who swore to the truth of the imputations in the libel. S. having in

(*f*) R. *v.* Cockshaw, 2 N. & M. 378; cf. *Ex parte* Williams, 5 Jur. 1133.

(*g*) R. *v.* Cockshaw, *supra.*

(*h*) R. *v.* Justices of Shrewsbury, 2 Barnard. 272; cf. Shaw *v.* Perkin, 1 Dowl. N. S. 306 (a case of *certiorari*).

(*i*) R. *v.* Jones, 8 Dowl. 307; see also Anon. 2 Lord Keny. 496.

(*k*) R. *v.* Wright, 2 Chitt. Rep. 162; R. *v.* Williamson, 3 B. & Ald. 582, where the affidavits in the first instance did not allege a corrupt motive in the mayor and town clerk against whom the motion was made: the affidavits having been amended, a new application was made and a rule granted.

(*l*) *Ex parte* Munster, 20 L. T. N. S. 612.

(*m*) 5 A. & El. 780.

another suit made an affidavit contradicting his former affidavit in all particulars, was indicted for perjury; a bill was found against him and he fled the country. The Court allowed a renewal of the application for an information which had been defeated by the perjuryof S.

The motion must be made by counsel; it cannot be made by the prosecutor in person. "Such a motion," said the Court, in *R.* v. *Justices of Lancashire* (*n*), "could only be made by the law officers of the Crown, or by a barrister who was in the nature of a public officer" (*o*). Motion.

The motion is for an order *nisi*, and must be made to a Divisional Court (*p*).

As to the time within which it must be made, vide *ante*, p. 39.

The hearing of any motion or application may from time to time * be adjourned, upon such terms, [* 53] if any, as the Court or judge shall think fit (*q*).

The motion may be for one rule against several defendants, and several defendants may be included in one information (*r*); but not where several rules have been granted against them individually (*s*).

Drawing up.—The order *nisi* should be drawn up "upon reading the affidavit of," or "the several affidavits of," &c., and in case of a newspaper libel it is essential that the rule should be drawn up on reading it (*t*). For form of order *nisi*, see Appendix. Order *nisi*.

Service.—The order *nisi* is served by leaving a copy and at the same time shewing the original order, which may be obtained from the Clerk of the Rules at the Crown Office. Personal service is not necessary (*u*); but service on the wife of a man who was abroad was held not sufficient service of an order against the husband (*x*). And so as to service on a person who was formerly, but is not shewn still to be, employed by the defendants (*y*).

No. 139 of the New Crown Office Rules now provides

(*n*) 1 Chitt. Rep. 603. See also Anon. 2 L. Rec. O. S. 479 (Irish).
(*o*) See also R. *v.* Brice, 2 B. & Ald. 606.
(*p*) C. O. R. 48.
(*q*) C. O. R. 260.
(*r*) R. *v.* Benfield, 2 Burr. 980; R. *v.* Hilbers, 2 Chitt. Rep. 163.
(*s*) R. *v.* Heydon and Others, 3 Burr. 1270.
(*t*) *Per* Lord Denman, R. *v.* Woolmer, 12 A. & El. 425; see also R. *v.* Lenehan, 8 Ir. L. R. 215.
(*u*) R. *v.* Badouin, 2 Str. 1044; and see R. *v.* Dickenson, 10 Ir. Rep. C. L. 91.
(*x*) Id.
(*y*) Anon. 2 Lord Keny, 496.

that wherever under those rules, service is not directed to be personal, service at the last-known place of abode or business, with a clerk, wife, or servant, or upon such other person, or in such other manner as the Court or a judge may direct, shall be deemed to be a sufficient service.

Enlarging time for shewing cause.

It is stated in Gude's Crown Practice (*z*) that if the prosecut or neglects to serve the defendant with a copy of the order, or is prevented by reason of the defendant not having any fixed place of residence, the Court will, upon motion, enlarge the order, as of course, to a subsequent day.

If the time is enlarged on the application of the defendant, it is usually on the terms that he shall file his affidavits with the Clerk of the Rules a certain number of days, which are specified in the order *nisi* (generally [* 54] a week), before the next day of shewing *cause; also that he shall appear immediately and plead within four days next after the information shall be filed, if the order *nisi* should be made absolute (*a*).

In one case of an information for libel (*b*), the Court refused to postpone the argument of the rule until the defendant could procure an affidavit from Trinidad to prove the truth of the matters in the alleged libel; but some of the grounds on which the defendant's application wasrefused would not now be considered good.

Where the rule, though served at the office of defendant on the 13th of the month, did not come to his knowledge till the 17th, and called on him to shew cause on the 18th, and the copies of the affidavits on which the rule *nisi* was granted, though applied for on the 15th, were not delivered until the evening of the 17th, the Court enlarged the rule (*c*).

Application was made to the Court in one case to postpone the shewing cause against a rule for a criminal information for libel until after the trial of a civil action brought in respect of the same libel by the prosecutor against a person other than the defendant in the information proceedings, the defendant in the action justifying on the ground of truth; but the Court refused the application, the defendant in the civil action being a stranger to the information proceedings (*d*).

(*z*) Vol. i. p. 117.

(*a*) 1 Gude, 117, 118. Where, however, in a case of *quo warranto*, the reason for enlarging the rule was the prosecutor's improper delay in serving the rule *nisi*, the defendant was not required to file his affidavit in the ordinary manner previous to shewing cause. R. *v.* Anderson, 9 Dowl. 1041.

(*b*) R. *v.* Draper, 3 Smith, 390.

(*c*) R. *v.* Hely, 10 Jur. 1009.

(*d*) R. *v.* Willmer, 15 Q. B. 50.

No person shall be allowed to shew cause against an order *nisi*, unless he shall have previously obtained office copies of such order and of the affidavits upon which it was granted (*e*). Office copies to be obtained by party shewing cause.

The defendant's affidavits may be entitled either simply, "In the High Court of Justice, Queen's Bench Division," or with the further addition, "The Queen against A.B." Shewing cause.

If the defendant denies the truth of the charge against him he should do so in clear and express terms. A mere denial of the evidence on which the application was made is not sufficient (*f*)

The other grounds on which the Court may be called on to *discharge the order *nisi* have already [* 55] been stated. They may be summed up as follows:—(1) want of notice; (2) lateness of the application; (3) defect in form of the affidavits; (4) that the applicant has already chosen another remedy; (5) that the applicant's own misconduct bars him; (6) that the applicant's affidavits have suppressed material facts, or (7) do not furnish sufficient evidence, or (8) contain unnecessary imputations; (9) that the offence charged is of too trivial a kind; (10) the low circumstances of the defendant.

The Court in discharging an order *nisi* may do so on any terms as to costs that it thinks fit. If the order is discharged on a preliminary objection, it is not the practice of the Court to give the defendant costs (*g*); nor where, though the the order has been discharged on the merits, the defendant has been guilty of improper conduct (*h*). In cases of this latter kind the order is discharged sometimes only on the defendant's undertaking to pay all the costs (*i*). Except in such cases, where the rule is discharged, it is usually with costs (*k*). Discharging order *nisi*.

Under the peculiar circumstances of one case, the

(*e*) R. *v.* Draper, 3 Smith, 26.

(*f*) R. *v.* Sharpe, And. Rep. 384.

(*g*) *Per curiam*, R. *v.* Proprietors of Nottingham Journal, 9 Dowl. 1043.

(*h*) R. *v.* Whately, 4 M. & Ry. 431 ; R. *v.* Jackson, Lofft. 147; R. *v.* Fielding, 2 Burr, 719, 722 ; R. *v.* Barrat, 2 Doug. 465. In R. *v.* Badger, (*ante*, p. 28), though the rule was discharged, the magistrates against whom it was moved were ordered to pay all the costs attending the application.

(*i*) R. *v.* Morgan, Doug. 314 ; R. *v.* Cozens, Doug. 410 ; R. *v.* Holland, 1 T. R. 692.

(*k*) R. *v.* Athay, 2 Burr. 653 ; R. *v.* Fielding, 2 Burr. 654 ; R. *v.* Wroughton, 3 Burr. 1683; R. *v.* Borron, 3 B. & Ald. 432; R. *v.* Smithson, 4 B. & Ad. 861; R. *v.* Hughes, 7 B. & C. 719.

Court in discharging the rule ordered the costs to be paid by the prosecutor's attorney as well as the prosecutor (*l*); but in no case would this be done where the attorney is not a party to the application or has not joined in any affidavit in support of it (*m*).

Civil action in respect of same offence.

In the year 1788 it was laid down by the Court, after consideration, in the case of *R.* v. *Sparrow* (*n*), "as a general rule for the future, that when a person applies for an information he is understood to waive his right [* 56] to bring an action, unless the Court * should, on hearing the whole matter, be of opinion that it is a proper subject to be tried in a civil action, and should specifically give him leave to do so" (*o*), and they said that "if an information be granted it is of course to stay the proceedings in an action for the same cause" (*p*). In this case, the prosecutor being called on to elect, abandoned his rule for an information, preferring to bring an action.

However, the Court of Exchequer, in 1847, held that an action for libel might be brought after a rule for an information in respect of the same libel had been discharged by the Court of Queen's Bench (*q*). Parke, B., said: "I thought the rule in *R.* v. *Sparrow* had only applied in cases where a criminal information had been granted;" and Platt, B., added: "Probably all that was intended by the rule laid down in *R.* v. *Sparrow* was to prevent the oppression of a criminal and civil proceeding from the same cause of complaint, by enabling the Attorney-General to enter a *nolle prosequi* if necessary."

Recognizance on order absolute.

On the order being made absolute, the prosecutor must enter into the necessary recognizance. By 4 & 5 Wm. & M. c. 18, s. 2, the sum was fixed at £20, and it was held that the Court would not require the security for a larger amount than the £20 mentioned in that statute (*r*). Now by the new Crown Office Rules (No. 46) the prosecutor must file at the Crown Office depart-

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(*l*) R. *v.* Fielding, 2 Burr. 654. The attorney had joined in the affidavit on which the rule had been obtained, and he was said to have declared that, "if it cost him £100, he would lay Fielding by the heels." See also R. *v.* Borron, 3 B. & A. 432, 440.

(*m*) R. *v.* Thomas, 7 A. & E. 698; R. *v.* Dodson, 9 A. & E. 704.

(*n*) 2 T. R. 198.

(*o*) See also the Irish case of R. *v.* O'Brien, Sm. & Bat. 79.

(*p*) 2 T. R. 198.

(*q*) Wakley *v.* Cooke, 16 M. & W. 822.

(*r*) R. *v.* Brooke, 2 T. R. 190.

ment a recognizance in the penalty of £50 effectually to prosecute such information and to abide by and observe such orders as the Court shall direct, such recognizance to be entered into before the Queen's coroner and attorney or the Master of the Crown Office or a justice of the peace of the county, borough, or place in which the cause may have arisen.

No process can issue before the recognizance has been entered into (*s*).

A form of recognizance will be found in the Appendix.

Every recognizance must, after the acknowledgment thereof, be transmitted to the Crown Office and filed there (*t*).

* No recognizance is henceforth to be for- [* 57] feited, estreated, or put upon the estreat roll without the order of the Court or judge, nor unless an order or notice shall have been previously served upon the parties by whom such recognizances shall have been given, calling upon them to perform the considerations thereof (*u*).

No proceedings are to be taken in the Crown Office by *scire facias* upon recognizance (*x*).

There is no appeal to the Court of Appeal from the decision of a Divisional Court in granting or refusing an order *nisi* for a criminal information, or in discharging or making absolute such an order. An appeal in criminal cases lies only for error on the record (*y*). Appeal.

As to proceedings in error, vide *post*, pp. 100 *seq.*

(*s*) R. *v.* Mayor of Hertford, 1 Salk. 376.
(*t*) C. O. R. 123.
(*u*) Id. 124.
(*x*) Id. 127.
(*y*) See R. *v.* Steel, L. R. 2 Q. B. D. 37; 46 L. J. M. C. 4. Cf. R. *v.* Fletcher, L. R. 2 Q. B. D. 43, and R. *v.* Whitchurch, L. R. 7 Q. B. D. 534.

[★58] ★CHAPTER V.

THE INFORMATION AND SUBSEQUENT PLEADINGS

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Substance of information.

In substance the information is the same as an indictment. The form is the same, too, except the beginning and the end, "Whatsoever certainty is requisite in an indictment, the same at least is necessary also in an information; and consequently, as all material parts of the crime must be found in the one, so must they be precisely alleged in the other, and not by way of argument or recital" (*a*).

The second and other counts are usually commenced thus—in the case of an *ex-officio* information: "And the said Attorney-General of our said lady the Queen, who prosecutes as aforesaid, further gives the Court here to understand and be informed that," &c.—in the case of an information filed by leave of the Court, "and the said coroner and attorney of our said lady the Queen who prosecutes as aforesaid, further gives the Court here to understand and be informed, that," &c. But this is not necessary; the second and subsequent counts may begin simply with the words: "And that," &c. (*b*).

Forms of Information will be found in theAppendix.

The description of the prosecutor as Charles Fred-
[★59] erick Augustus ★William, Duke of Brunswick and Lüneburg, was held sufficient, though he had ceased to be reigning Duke, and his family name (D'Este) was omitted (*c*).

A criminal information having been filed by the At-

(*a*) 2 Hawk. P. C. c. 26, s. 4. See R. *v.* Roberts, Carth. 226; 3 Salk. 192, 201; R. *v.* Robe, 2 Str. 999; R. *v.* Knight, 1 Salk. 375; R. *v.* Read, Sir T. Ray. 34, R. *v.* Benfield. 2 Burr. 980.

(*b*) R. *v.* Read, Sir T. Ray. 34.

(*c*) R. *v.* Gregory, 8 Q. B. 508; cf. R. *v.* Sulls, 2 Leach's C. C. 861.

torney-General of New South Wales against a member of the legislative assembly of that colony for an assault on another member within the precincts of the house, the Supreme Court of the colony allowed a general demurrer, because the information, besides averring the assault, added that it was in contempt of the assembly; but the Judicial Committee of the Privy Council overruled this decision and held the information good, as the alleged contempt was charged only as matter of aggravation and could be rejected as surplusage (*d*).

Filing.

The draft information is usually settled by Counsel; it is then engrossed on parchment, signed by the Master of the Crown Office and filed, along with the prosecutor's recognizance.

Appearance by defendant.

The defendant must enter or cause to be entered in a book at the Crown Office an appearance to the information (*e*).

Compelling appearance.

If the defendant is not under terms to appear, a subpœna to appear is usually served upon him. For form, see Appendix, *post.*

As against any defendant to any information, the prosecutor may obtain a certificate from one of the officers of the Crown Office of the information having been filed. The certificate may be in the Form No. 41, or 42, appended to the new Crown Office rules, or to the like effect (*f*).

Upon production of such certificate to a judge, he may, if necessary, issue a warrant under his hand to apprehend the defendant and cause him to be brought before him or some other judge, or before a justice of the peace, to be dealt with according to law; the warrant may be in Form No. 43, or 44, or to the like effect (*g*).

If it be proved upon oath before such judge or justice of the peace that the person apprehended and brought before him is the person charged and named in such information, such judge or justice of the peace shall without further inquiry or examination ★ commit him to prison by a warrant, which [★ 60] may be in the Form No. 45, or to the like effect, or admit him to bail: provided that nothing in these rules shall affect the jurisdiction of a judge to admit any defendant to bail whether in felony or misdemeanor at

(*d*) Attorney-General of N. S. Wales *v.* Macpherson, L. R. 3 P. C. 268.
(*e*) C. O. R. 83.
(*f*) C. O. R. 86. See these Forms in the Appendix, *post.*
(*g*) Id. 87. See Form in Appendix, *post.*

any time after committal and before conviction if he shall in his discretion so think fit (*h*).

Appearance for defendant.

When any information is filed and the defendant is under terms to appear immediately and does not enter an appearance, the prosecutor may serve a notice upon the defendant to appear within five days, and in default of appearance may move the Court *ex parte* for leave to enter an appearance for him, or, if the notice was personally served, for an attachment (*i*).

Recognizance by defendant.

If the defendant on any information wishes to avoid arrest upon a warrant, he may give twenty-four hours' notice of bail to the prosecutor, and enter into a recognizance before a judge or justice of the peace with sufficient surety or sureties to appear and answer the information, and personally appear at the trial, and on the return of the *postea* if it be necessary, and so from day to day, and not depart without leave of the Court (*k*).

Every recognizance to appear and answer to any *ex-officio* or criminal information must, unless the Court or a judge shall by order dispense therewith, contain, besides any other condition which may be imposed, a condition that the defendant shall personally appear from day to day on the trial of the information and not depart until he shall be discharged by the Court before whom such trial shall be had (*l*). For form of recognizance see Appendix.

If the defendant be taken on a warrant he must give twenty-four hours' notice of bail, and enter into a recognizance as above mentioned, before he can be discharged (*m*).

Entry of appearance for defendant in prison.

If any defendant shall be detained in any prison for want of bail, the prosecutor of any such information may cause a copy thereof to be delivered to the gaoler of the prison for such defendant, with a notice endorsed thereon that if the defendant do not within eight days after such delivery cause an appearance and a plea or demurrer to be entered to such information, an appear-
[★ 61] ance ★ and plea of not guilty will be entered for him; and if the defendant do not enter such appearance and plea or demurrer within eight days from the delivery of such copy of the information and notice, the prosecutor, upon filing an affidavit of the delivery of such copy and notice endorsed thereon to the keeper or gaoler as aforesaid, may cause an appearance and plea of not guilty to be entered for the defendant, and pro-

(*h*) C. O. R. 88. See Form of Warrant in Appendix, *post*.
(*i*) C. O. R. 90. (*k*) C. O. R. 91.
(*l*) Id. 125. (*m*) Id. 92.

ceedings shall be had thereon as if the defendant himself had duly appeared and entered such plea (*n*). For form of notice see Appendix.

Estreating recognizance.

Every recognizance, after acknowledgment, is to be transmitted to the Crown Office and filed there (*o*), and no recognizance is to be forfeited, estreated, or put upon the estreat roll without the order of the Court or a judge, nor unless an order or notice shall have been previously served upon the parties by whom such recognizances shall have been given, calling upon them to perform the conditions thereof, and no default shall be considered to be made in performing the conditions of a recognizance by reason of any proceeding standing over by order of the Court or by consent in writing of the parties (*p*).

Whenever it has been made to appear to the Court or a judge that a party has made default in performing the conditions of any recognizance into which he has entered, filed in the Crown Office, the Court or a judge, upon notice to the defendant and his sureties, if any, may order such recognizance to be estreated into the Exchequer, without issuing any writ of *scire facias* (*q*).

Discharge of defendant.

If the defendant be committed to prison and detained for want of bail for his appearance to the information for the space of one calendar month next following such commitment, and the prosecutor does not proceed within that time, such defendant shall, after the expiration thereof, be discharged by order of the Court or a judge upon entering a common appearance to the information (unless good cause shall be shewn to the contrary) (*r*).

Eight days' notice must be given by the defendant or his solicitor of his intention to apply for such order (*s*).

Attachment.

If the defendant does not appear within four days after the day named in the subpœna to answer, the prosecutor, upon filing an ★ affidavit of due service of the subpœna to answer, may issue a writ of attachment (*t*). [★ 62]

A form of affidavit of service of the subpœna will be found in the Appendix; also a form of writ of attachment to answer.

A subpœna need not be served where, on the order *nisi* being enlarged, the defendant undertakes to appear to the information, immediately on its being filed.

(*n*) C. O. R. 93.
(*o*) Id. 123.
(*p*) Id. 124.
(*q*) C. O. R. 126.
(*r*) Id. 44.
(*s*) Id.
(*t*) C. O. R. 95.

In such case, as already stated, it is only necessary, on the information and recognizance being filed, to serve on the defendant or his solicitor the notice required by No. 90 of the New Crown Office Rules, and referred to *ante*, p. 60.

A form of notice to defendant to appear to the information, in pursuance of an undertaking given on the order being enlarged, will be found in the Appendix (*w*).

This form requires the defendant to cause an appearance to be entered to the information "immediately," in pursuance of his undertaking.

Where the defendant had undertaken on the order *nisi* being enlarged "to appear and plead immediately" to the information, in case the order should be made absolute, the Court held that a reasonable time must be allowed him to do so (*x*). Where a prosecutor, for this purpose, unnecessarily obtained a rule against the defendant, the Court, though it made the rule absolute, ordered the prosecutor to pay the costs of it.

An order to appear, plead and try, pursuant to recognizance, may be drawn up of course at the Crown Office, without any motion for the same (*y*).

Outlawry for non-appearance

If none of the preceding methods of enforcing an appearance can be followed owing to the defendant's absconding, the only other resource of the prosecutor is to make the defendant an outlaw. As, however, outlawry involves severer consequences than any misdemeanor would entail (*z*), the prosecutor is not likely [★63] to be ★ driven to the application of this remedy; and the procedure (*a*) is seldom resorted to.

(*w*) No. 46 of the New Crown Office Forms.

(*x*) R. *v.* Muntz, 2 Jur. 538. (*y*) C. O. R. 252.

(*z*) Lord Mansfield, in R. *v.* Wilkes, 4 Burr. 2549, said: "In misdemeanors outlawry is generally a more severe punishment than would be inflicted for the crime of which the outlaw stands accused or convicted. It is a forfeiture of his goods and chattels, and all the profits of his real estate; and perpetual imprisonment with many incapacities." Nothing in the Act (33 & 34 Vict. c. 23) to abolish forfeitures for treason and felony "shall affect the law of forfeiture consequent upon outlawry" (s. 1).

(*a*) "The first process for this purpose [outlawry] in cases of treason or felony is a writ of *capias;* but in misdemeanors the process is less summary. For here there is in the first place a writ of *venire facias*, which is in the nature of a summons to cause the party to appear; and if, by the return to such *venire*, it appears that the party hath lands in the county whereby he may be distrained, then a distress infinite shall be issued from time to time till he appears. But if the sheriff returns that he has no lands in his bailiwick, then upon his non-appearance a writ of *capias* shall issue, which commands the sheriff to take his body and have him at the next assizes [or on the first day of the following term]; and if he cannot be taken upon the first, a second

The following rules now regulate the procedure in outlawry.

To proceed to outlawry before judgment on an information, the prosecutor must issue a writ of *venire facias* at the Crown Office returnable on a day certain either in or out of the sittings (*b*).

On the return of the sheriff that he has summoned the defendant, and the defendant has not appeared, the prosecutor may issue a *distringas* to answer, returnable on a day certain either in or out of the sittings, and if necessary alias writs of *distringas*, and if the sheriff return that the defendant has no goods in his bailiwick whereby he can be summoned, or distrained, a *capias ad respondendum* tested, and made returnable as the writ of *venire facias*, may be issued on the fourth day after the return (*c*).

On the return of *non est inventus* to a *capias ad respondendum*, before the prosecutor can proceed further, he must issue a second writ of *capias* on the fourth day after the return to the first, made returnable as the first writ, and also issue a third writ of *capias* on the fourth day after the return of the second, tested and made returnable, as the second writ (*d*).

★ If the defendant is dwelling in a county [★64] other than that in which the information is laid, the prosecutor must issue another second writ of *capias cum proclamatione* to the sheriff of the foreign county, after the return of the first writ to the sheriff of the county in which the information is laid, tested as the other writs of *capias*, but not to be made returnable till such a day certain as will enable the sheriff of the foreign county, if he cannot be found, to make proclamation at two of his county courts either three months, or four months, after the issue of the writ according as the sheriff may hold his courts from month to month, or six weeks to six weeks (*e*).

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and a third shall issue, called an *alias* and a *pluries capias*. And after the proper writs have issued without any effect, the offender shall be put in the *exigent* in order to his outlawry; that is, he shall be exacted (proclaimed or required to surrender) at five successive County Courts [the County Courts to which Blackstone here refers are those which used to be held before the Sheriff], and a writ of proclamation shall also be issued [according to 31 Eliz. c. 3; 4 & 5 W. & M. c. 22, s. 4; 7 Wm. 4 & 1 Vict. c. 45]; and if he be returned *quinto exactus*, and does not appear at the fifth exaction or requisition, then he is adjudged to be outlawed or put out of the protection of the law."—4 Step. Black. 394, 395 (ed. 10).

(*b*) C. O. R. 99.
(*c*) Id. 100.
(*d*) Id. 101.
(*e*) C. O. R. 102.

Upon a return of *non est inventus* to the third writ of *capias* in the same county, and, if the defendant be dwelling in another county, to the *capias* to the sheriff of such county, a writ of *exigent* must be issued by the prosecutor (*f*).

Simultaneously with the writ of *exigent* a *writ of proclamations* must be issued to the sheriff of the county where the defendant is mentioned to be, or inhabit. Both writs must be tested on the day of the return to the previous process, and returnable on such a day certain during the sittings, as will admit of their being delivered to the sheriff three months before return (*g*).

If it does not appear by the return to the writ of *exigent* that the defendant has been exacted five times and outlawed, the prosecutor must issue another writ of *exigent with allocatur*, commanding the sheriff to cause him to be further exacted until he shall have been exacted five times and outlawed (*h*).

Upon the return of the sheriff that the defendant has been exacted five times and outlawed, on application of the prosecutor judgment may be entered at the Crown Office (*i*).

After judgment has been entered, the roll of all the proceedings may be engrossed by the prosecutor, and filed at the Crown Office (*k*).

A writ of *capeas utlagatum* may be issued by the prosecutor at any time the defendant is likely to be found, or a like writ special, *cum breve de inquirendo*, or if necessary a writ of *melius inquirendum* may be applied for (*l*).

For forms of all of the above-mentioned writs, see Appendix.

[★65] ★ On proceeding to outlawry after judgment on information, the prosecutor may issue a writ of *capias ad satisfaciendum* into the county where the information is laid, returnable on the first day of the then next sittings. One writ of *capias* only need be issued, and on return of *non est inventus*, the prosecutor may issue a writ of *exigent* tested on the return day of the writ of *capias*, returnable on the first day of the then next sittings. It shall not be necessary to issue any writ of proclamations on the return of a writ of *capias ad satisfaciendum* (*m*).

After the return to the writ of *exigent*, the rules as to proceeding after writ of *exigent* in outlawry before

(*f*) Id. 103. (*g*) Id. 104. (*h*) Id. 105.
(*i*) C. O. R. 106. (*k*) Id. 107. (*l*) Id. 108.
(*m*) C. O. R. 110.

judgment shall apply to proceedings in outlawry after judgment (*n*).

In the county of Lancaster the *capias utlagatum* and all subsequent process shall be directed to the Chancellor of the Duchy (*o*).

Reversal of outlawry.

It shall not be necessary for any person who shall be outlawed before conviction for any matter or thing, except treason or felony, to appear in person to reverse such outlawry, but such person may appear by solicitor and reverse the same (*p*).

If any person outlawed (otherwise than for treason or felony), before conviction be taken and arrested upon any *capias utlagatum*, the sheriff may take a solicitor's engagement under his hand to appear for the defendant, and shall thereupon discharge the defendant from the arrest (*q*).

If a defendant surrenders or is taken, before outlawry is complete, on misdemeanor before judgment, he may give bail in such amount, and with or without sureties, as a judge may direct, to appear to the indictment, inquisition, or information, and on appearance apply to the Court or a judge for a *supersedeas* to the process of outlawry (*r*).

If a defendant comes in on an indictment or information for misdemeanor, and reverses the outlawry before judgment, he shall plead instanter (*s*).

To reverse outlawry after conviction the defendant shall surrender himself into custody, and afterwards be brought into ★ Court to assign errors upon the [★66] judgment in outlawry, by *habeas corpus* (*t*).

If the defendant be taken on a *capias utlagatum*, he shall deliver the writ of error into Court when he appears upon the return to the *capias*; he shall then move for an order to bring him up again to assign errors, and shall be committed by the Court to the Queen's Prison (*u*).

Until outlawry be reversed a defendant after conviction shall not be committed, or called up for judgment upon an indictment, information, or inquisition (*x*).

Upon the assignment of error in outlawry, the prosecutor shall join in error within eight days, and the case may then be entered in the Crown paper for argument, on the application of either party, as in error to the Queen's Bench Division from inferior Courts (*y*).

"Outlawry," said Lord Mansfield (*z*), "cannot be re-

(*n*) Id. 111. (*o*) Id. 112. (*p*) Id. 113.
(*q*) C. O. R. 114. (*r*) Id. 115. (*s*) Id. 114.
(*t*) C. O. R. 118. (*u*) Id. 119. (*x*) Id. 120.
(*y*) Id. 121. (*z*) 4 Burr. 2550.

versed without a writ of error. In the 3rd of Queen Anne, ten of the judges were of opinion 'that in all cases under treason and felony, a writ of error was not merely of grace, but ought to be granted.' Price and Smith were of a contrary opinion, 'that a writ of error was of grace only in all cases': the ten did not mean 'that it was a writ of course,' but that 'where there was a probable error it ought not to be denied': it cannot issue now without a fiat from the Attorney-General (*a*), who always examines whether it be sought merely for delay, or upon a probable error. . . . In a misdemeanor, if there be probable cause, it ought not to be denied; this Court would *order* the Attorney-General to grant his fiat; but be the error ever so manifest in treason or felony, the king's pleasure to deny the writ is conclusive (*b*). If the Attorney-General confesses an error in fact, the Court will reverse the outlawry; but his confessing an error in law will not, of necessity, have the same effect; the Court will judge for itself whether there is such an error" (*c*).

As to proceedings in error, generally, vide *post*, pp. 100 *seq.*

Order to plead.

[★67] ★On the appearance of the defendant, an order to plead may be drawn up at the Crown Office by the prosecutor or his solicitor (*d*).

Such order may be drawn up and served as well during the sittings as in vacation (*e*).

It expires ten days next after service thereof, unless the time be extended by order of the Court or a judge (*f*).

An application for an extension of the time to plead is made by summons to a judge at Chambers, who may grant it upon such terms and for such time as he in his discretion may think fit (*g*).

Plea of guilty.

A plea of gulty need not be signed by counsel.

If a defendant wishes either to plead guilty or to allow judgment by default during vacation, he ought to apply to a judge at Chambers for a stay of execution till the following sittings. An order so obtained will protect him from arrest.

Defences.

The usual defences are: (1) plea in abatement; (2) demurrer; (3) plea of not guilty; (4) in cases of libel, plea of justification under Lord Campbell's Act (6 & 7 Vict. c. 96, s. 6).

(*a*) This is still the case: see C. O. R. 184.

(*b*) 4 Burr. 2550.

(*c*) Id. For examples of reversal of outlawry, see Barrington *v.* R., 3 T. R. 499; and R. *v.* Almon, 5 T. R. 202; *cf.* R. *v.* Yandell, 4 T. R. 521.

(*d*) C. O. R. 132. (*e*) Id. 131. (*f*) Id. (*g*) Id. 133.

Plea in abatement.

A plea in abatement is rendered useless by 7 Geo. 4, c. 64, s. 19, which enacts that "no indictment or information shall be abated by reason of any dilatory plea of misnomer, or want of additions, or of wrong addition of the party offering such plea, if the Court shall be satisfied by affidavit or otherwise of the truth of such plea; but in such case the Court shall forthwith cause the indictment or information to be amended according to the truth, and shall call upon such party to plead thereto, and shall proceed as if no dilatory plea had been pleaded."

Demurrer.

A demurrer to an information differs from the demurrer allowed in a civil action in this respect, that it admits, not merely for the purposes of the argument, but absolutely, the truth of the matters charged in the information. Judgment against the defendant, upon demurrer, has therefore the same effect as judgment upon a verdict of guilty (*h*).

★ An order to demur may be drawn up, of [★ 68] course, at the Crown Office without any motion for the same (*i*).

It is not necessary to demur specially, or to state the grounds of demurrer in the margin: neither 4 & 5 Ann. c. 16, nor the rule of H. T., 4 Will. 4, applies to criminal cases (*k*).

The draft demurrer signed by counsel is filed by the defendant's solicitor, who makes one office copy for the defendant and another for the prosecutor's solicitor (*l*).

The joinder in demurrer, usually prepared and signed by counsel, is filed by the prosecutor's solicitor.

Joinder in demurrer.—An order to join in demurrer may be obtained, of course, at the Crown Office without any motion for the same (*m*).

One order only to join in demurrer shall be given, and such order may be drawn up and served as well during the sittings as in vacation, and every such order is to expire in eight days after service thereof, unless the time is extended by order of the Court or a judge (*n*).

The Crown could always plead and demur at the same time (*o*).

(*h*) In cases of indictments for felony the rule is otherwise, *in favorem vitæ:* after judgment on demurrer against him, the prisoner may plead not guilty; see *per* Abbott, C.J., R. *v.* Taylor, 3 B. & C. 514.

(*i*) C. O. R. 252.

(*k*) See, on the latter point, R. *v.* Woollett, 2 Cr. M. & R. 256.

(*l*) 1 Gude, 93. (*m*) C. O. R. 252. (*n*) C. O. R. 131.

(*o*) See *per* Willes, J., Tobin *v.* R., 14 C. B. N. S. 522.

Entry of demurrer.—The necessity of moving for a *concilium* is now abolished (*p*).

A demurrer is to be entered at the Crown Office for hearing at the request of either party, without any order for a *concilium*, eight clear days before the day on which it is set down for argument, and notice thereof is to be given forthwith to the opposite party (*q*).

Paper books.—In all cases entered for argument in the Crown paper, where paper books are required, the party or solicitor entering must, two days before the day appointed for argument, deliver two paper books of the proceedings, for the use of the judges, at the Crown Office (*r*).

Such paper books shall be marked "for the use of [★ 69] the judges in ★ the Queen's Bench Division," and not with the name of any particular judge (*s*).

If paper books are not delivered the other party may, on the day following, deliver such copies as ought to have been so delivered by the party making default, and the party making default shall not be heard until he shall have paid for such copies or deposited at the Crown office a sufficient sum to pay for the same. If both parties make default the case shall be struck out, unless otherwise ordered (*t*).

The paper books should state in the margin the points intended to be argued (*u*).

Only one counsel on each side is heard. Counsel in support of the demurrer is first heard, and he is also allowed to reply.

Judgment on demurrer.

If judgment is for the defendant, there is an end of the matter. If judgment is for the Crown, the defendant is brought up to receive sentence, after which final judgment is entered on the roll.

For forms of judgment on demurrer, see Appendix, *post*.

After demurrer, as well as before, the information may be amended upon application to the Court or a judge at chambers (*x*).

(*p*) C. O. R. 141. *Concilium* or *Consilium, dies consilii:* a time allowed for one accused to make his defence and answer the charge of the accuser; in modern times used for a speedy day appointed to argue a demurrer. Prior to Reg. Gen. of T. T. 1853 (r. 15) a motion or rule for a concilium was required before the argument of a demurrer in a civil action also.

(*q*) C. O. R. 141. (*r*) Id. 143. (*s*) C. O. R. 144.

(*t*) Id. 146. (*u*) 1 Gude, 94. 95.

(*x*) R. *v.* Holland, 4 T. R. 457; R. *v.* Wilkes, 4 Burr. 2528, 2532, 2566, 2568, 2573; R. *v.* Harris, 1 Salk. 47; R. *v.* Norton, Fortesc. 232; R. *v.* Nixon, 1 Str. 185.

Plea of not guilty.

The plea of not guilty puts in issue every material fact alleged in the information.

It need not be signed by counsel.

No other plea (except in libel cases) will be allowed with that of not guilty, as double pleading is not permitted.

The Court refused to allow a defendant to add to not guilty, already on the record, a plea *puis darrein continuance*, alleging that a material and necessary witness for the Crown having at the time refused to give evidence, was committed for contempt, and thereupon, on the application of counsel for the Crown, the defendant objecting, the judge improperly discharged the jury from giving a verdict (*y*).

Plea of justification in cases of libel.

Before Lord Campbell's Act (6 & 7 Vict. c. 96) a defendant could not plead to an information for libel, any more than to an indictment, the truth of the defamatory matter. Sect. 6 of that Act now enables a defendant to plead as a defence the truth of the alleged ★ de-[★ 70] famatory matter, and that it was for the public benefit that it should be published. See the form of this plea in the Appendix.

A plea of justification is not allowed in prosecutions for blasphemous, obscene, or seditious libels (*z*).

Where this plea is allowed, it is competent to the defendant to plead, in addition to it, a plea of not guilty also (*a*).

If a plea of justification is pleaded and the defendant is convicted, the Court in pronouncing sentence may consider whether his guilt is aggravated or mitigated by the plea and by the evidence given to prove or disprove it (*b*).

What other matters may be urged in aggravation or mitigation will be considered hereafter (*c*).

Pendency of another prosecution no defence.

The pendency of another prosecution for the same offence cannot be pleaded as a defence. Hawkins' observations to a contrary effect (B. 2, c. 26, s. 63; c. 34, s. 1) apply only to *qui tam* informations (*d*).

Every pleading other than a plea of guilty or not

(*y*) R. *v.* Charlesworth, 1 B. & S. 460.

(*z*) See R. *v.* Duffy (2 Cox, Cr. Cas. 45) followed in *Ex parte* O'Brien (15 Cox, Cr. Cas. 180).

(*a*) 6 & 7 Vict. c. 96, s. 6.

(*b*) Id.

(*c*) Vide *post*, pp. 93–96.

(*d*) See R. *v.* Stratton, Doug. 240, and note (*i*). As to staying a criminal information by a private individual where the Attorney-General has filed an *ex-officio* information for the same cause, see R. *v.* Alexander; cited *ante*, p. 11.

Rules applicable to pleas and demurrers.

guilty is to be intituled: "In the High Court of Justice, Queen's Bench Division," and is to be dated of the day of the month and the year when the same was pleaded, and is to bear no other time or date (*e*).

It is to be written or printed on paper, and a copy is to be delivered to the opposite party and to be filed at the Crown Office (*f*).

Every special plea or demurrer is to be in writing, and if settled by counsel, signed by him; and if not so settled, it is to be signed by the solicitor, or the party if he defends in person (*g*).

The time to plead may be extended on application by summons to a judge at chambers, upon such terms and for such time as the judge in his discretion may think fit (*h*).

One order only to plead, reply, rejoin, join in demurrer or in error, or plead subsequent pleadings, shall be given (*i*).

[★71] ★ Such order may be drawn up and served as well during the sittings as in vacation (*k*).

Every such order shall expire as follows, that is to say, every order to plead, in ten days next after service thereof, unless the time be extended by order of the Court or a judge; and every order to reply, rejoin, join in demurrer, or in error, or to plead subsequent pleadings, in eight days next after service thereof, unless the time be extended as aforesaid (*l*).

Procuring copies of pleadings, &c.

Copies of all informations and of all pleadings thereupon are, when required, to be made at the Crown Office and delivered to the respective parties, or other parties requiring the same, on payment of the proper charges (*m*).

Mode of service of pleadings, &c.

Whenever service of any pleading, order, or other document, &c., is not expressly directed to be personal, service at the last-known place of abode, or business, with a clerk, wife, or servant, or upon such other person, or in such other manner as the Court or a judge may direct, shall be deemed to be a sufficient service (*n*).

Amendment of information.

The information may be amended, almost as of course, at any time, even after demurrer or plea of not guilty, on application to the Court, or by summons, to a judge at chambers (*o*).

(*e*) C. O. R. 128. (*f*) Id. (*g*) Id. 130. (*h*) Id. 133. (*i*) Id. (*k*) C. O. R. 131. (*l*) Id.

(*m*) C. O. R. 138; as to the charges, see the Appendix, *post.*

(*n*) C. O. R. 139.

(*o*) R. *v.* Wilkes, 4 Burr. 2528, 2532, 2566, 2568, 2573. R. *v.* Holland, 4 T. R. 457; R. *v.* Nixon, 1 Str. 185; R. *v.* Gregory, 1 Salk. 372; R. *v.* Stratton, 1 Doug. 239. An *ex-officio* informa-

Therefore the Court will hardly ever quash it, even on the application of the Attorney-General, for he, besides having it amended, may, if so minded, enter a *nolle prosequi*, and file another information (*p*).

An application to strike out any unnecessary counts in an *ex-officio* information should be made to the Attorney-General, and not to the Court (*q*).

★ A rule on the part of the Attorney-General [★72] to amend an *ex-officio* information is absolute in the first instance (*r*).

Issue is joined on the plea of not guilty or on that of justification in libel cases by adding the *similiter*. Joinder of issue.

For subsequent proceedings, see the next chapter.

In case no plea, replication, rejoinder, joinder in demurrer or other pleading shall be entered within the time limited, judgment as for want of such pleading may be entered at the opening of the office on the next following morning after the expiration of the time limited, upon filing an affidavit of service of the order to plead, reply, &c., as the case may be, unless an order of the Court or judge extending such time shall have been obtained and served, in which case judgment shall not be signed until the day after the expiration of the time granted by such order (*s*). Judgment by default.

Judgment for default of plea is that the defendant "be convicted of the offences aforesaid, and that he be taken, and so forth," to which is added, after the defendant has been taken into custody and brought into Court for sentence, the punishment awarded.

Any application to strike a case out of the Crown paper, or to accelerate any case in it on the ground of urgency, must be made upon two clear days' notice of motion, and be brought on as if it was an *ex parte* motion, and not put into the Crown paper (*t*). Striking out or accelerating case.

If the Court or a judge thinks that any person to whom notice has not been given ought to have or to have had notice, the motion may be dismissed or adjourned in order that such notice may be given, on such

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tion *in rem* was allowed to be amended, after plea pleaded, by adding additional counts, although a recognizance had been entered into by the bail to pay the costs occasioned by the claim. As the recognizance was entered into before the information was filed, the amendment could make no difference, as the bail took the chance of what the Crown might do: Attorney-General *v.* Smith, 5 M. & W. 372.

(*p*) See cases first referred to in last note.
(*q*) R. *v.* Green, Cas. temp Hard. 209.
(*r*) Attorney-General *v.* Ray, 11 M. & W. 464.
(*s*) C. O. R. 170.
(*t*) Id. 255.

terms, if any, as the Court or judge may think fit to impose (*u*).

If the motion is founded on evidence by affidavit, a copy of the affidavit intended to be used must be served with the notice of motion (*x*).

The hearing of any motion may from time to time be adjourned upon such terms, if any, as the Court or judge shall think fit (*z*).

Motions.

The following new Crown Office Rules regulate the practice as to motions on the Crown side:—

Unless the Court or a judge give special leave to the [★ 73] contrary, ★ there shall be at least two clear days between the service of a notice of motion and the day named in the notice for hearing it (*a*).

Orders of course.—The following orders of course may be drawn up at the Crown Office without any motion for the same:—

(*a.*) To appear, plead, and try (pursuant to recognizance).

(*b.*) To plead (except pleading double or several matters).

(*c.*) To demur, join in demurrer, plead any subsequent plea.

(*d.*) To assign error.

(*e.*) To join in error.

(*f.*) To bring in body of prisoner under commitment from Queen's Bench Division, where a writ of *habeas corpus* is not necessary.

(*g.*) For *habeas corpus* in cases where process has issued from the Queen's Bench Division; or where upon writ of error the attendance of the party is necessarily required in Court, or chambers, or at the Crown Office by the Court itself.

(*h.*) To a sheriff on a return of *cepi corpus* to bring in a prisoner within the proper time.

(*i.*) To return writs.

(*j.*) To tax costs.

(*l.*) To supersede attachment, or other process for compelling appearance where appearance has been entered.

(*q.*) For a view.

(*r.*) To summon a special jury.

(*s.*) To summon a jury on trial at bar (*b*).

(*u*) C. O. R. 259.
(*x*) Id. 256.
(*z*) Ik. 260.
(*a*) C. O. R. 251.
(*b*) Id. 252.

Other orders.—All other orders shall, during the sittings, be made by the Court on motion supported by affidavit, but no affidavit shall be necessary for an order demandable as of right by the Crown, or where it is not necessary to state matters of fact (*c*).

Except as may be otherwise provided by these Rules, all applications on the Crown side shall be made by way of motion to a Divisional Court for an order *nisi* (*d*).

Notice of motion.—The following applications shall be made upon two clear days' notice of motion, and be brought on as if they were *ex parte* motions and not put into the Crown paper:—

(*a.*) For time, enlargement, stay, or security.

(*b.*) To strike a case out of the Crown paper.

(*c.*) To file a special case by leave of the Court.

★ (*d.*) To accelerate a case in the Crown [★ 74] paper on the ground of urgency.

(*e.*) For costs to a defendant in criminal information to the amount of the recognizance (*e*).

Service of affidavit.—When any motion is made under Rule 255 and founded on evidence by affidavit, a copy of such affidavit intended to be used shall be served with the notice of motion (*f*).

When leave necessary.—No order on the Crown side, except orders of course, shall be drawn up without the leave or order of the Court or a judge, or of the Queen's Coroner and Attorney, or the Master of the Crown Office (*g*).

Adjournment for notice.—If on hearing of a motion or other application the Court or a judge shall be of opinion that any person to whom notice has not been given ought to have or to have had such notice, the Court or judge may either dismiss the motion or application, or adjourn the hearing thereof, in order that such notice may be given, upon such terms, if any, as the Court or judge may think fit to impose (*h*).

The hearing of any motion or application may from time to time be adjourned upon such terms, if any, as the Court or judge shall think fit (*i*).

Effect of non-compliance with any rule.

Non-compliance with any rule of practic for the time being in force, is not to render any proceeding void, unless the Court or a judge shall so direct; but such

(*c*) C. O. R. 253.
(*d*) Id. 254.
(*e*) C. O. R. 255.
(*f*) Id. 256.
(*g*) Id. 258.
(*h*) Id. 259.
(*i*) Id. 260.

proceedings may be set aside either wholly or in part as irregular, or amended or otherwise dealt with in such manner and upon such terms as the Court or judge shall think fit (*k*).

No application to set aside any proceeding for irregularity is to be allowed unless made within reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity (*l*).

Where an application is made to set aside proceedings for irregularity, the several objections intended to be insisted on are to be stated in the summons or notice of motion (*m*).

Rules as to time.

For the rules as to time, see pp. 76, 77, *post*.

(*k*) C. O. R. 303; Order LXX. of Supreme Court Rules, 1883, r. 1.

(*l*) Order LXX. r. 2.

(*m*) Id. r. 3.

★CHAPTER VI. [★75]

PROCEDURE FROM CLOSE OF PLEADINGS.

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Notice of trial.

After the *similiter* is added by the prosecutor the issue is made up, and notice of trial is indorsed on it, and served on the opposite party.

Notice of trial must be given before entering the record for trial (*a*).

The notice of trial must state the place at which the trial is to be had, and the day on or after which the record is to be tried (*b*).

If the prosecutor or relator does not, within six weeks after issue joined, or within such extended time as the Court or a judge may allow, give notice of trial, the defendant may give such notice, and when the defendant is bound by recognizance to give notice of trial the prosecutor may, in all cases, give notice by proviso (*c*).

Ten days' notice of trial shall be given in all cases, unless a longer notice shall be ordered by the Court or a judge, or the party to whom it is given shall consent to take short notice of trial (*d*).

Short notice.—Short notice of trial is to be understood to mean four days' notice or any longer period (*e*).

★ *For London or Middlesex,*—Notice of trial [★76] for London or Middlesex is not to be, or operate as for, any particular sittings, but is to be deemed to be for the day stated in the notice, or for any day after the expiration of the notice on which the record may come on for trial (*f*).

For trial elsewhere.—Notice of trial elsewhere than in London or Middlesex is to be deemed to be for the first

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(*a*) C. O. R. 151. (*b*) Id. 148. (*c*) Id. 149.
(*d*) C. O. R. 150. (*e*) Id. (*f*) C. O. R. 152.

day of the then next assizes, at the place for which notice of trial is given (*g*).

Countermanding notice, and withdrawing record.

No notice of trial is to be countermanded, and no record withdrawn except by leave of the Court or a judge, which leave may be given subject to such terms as to costs or otherwise as may be just (*h*).

Forms of notices of trial will be found in the Appendix.

Entering record for trial.

If the prosecutor or relator, after having given notice of trial for London or Middlesex, does not enter the record within six days, the party to whom notice may have been given shall be at liberty to enter it with the leave of the Court or a judge (*i*).

Rules as to time.

The following rules as to time are by the new Crown Office Rules made applicable to all criminal proceedings on the Crown side.

In all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules or the practice of the Court, the same shall be reckoned exclusively of the first day and inclusively of the last day (*k*).

Where any limited time less than six days from and after any date or event is appointed or allowed for doing any act or taking any proceeding, Sunday, Christmas Day, and Good Friday shall not be reckoned in the computation of such limited time (*l*).

Where the time for doing any act or taking any proceeding expires on a Sunday or other days on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding shall, as far as regards the time of doing or taking the same, be held to be duly done or taken, if done or taken on the day on which the office shall next be opened (*m*).

[★77] ★ A Court or a judge shall have power to enlarge or abridge the time appointed by these Rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require; and any such enlargement may be ordered at the discretion of the Court or a judge, although the application for the same is not made until after the expiration of the time appointed or allowed (*n*).

In all causes in which there have been no proceedings for one year from the last proceeding had, the party, whether prosecutor or defendant, who desires to

(*g*) Id. 153. (*h*) Id. 154. (*i*) Id. 156. (*k*) C. O. R. 294.
(*l*) Id. 295. (*m*) Id. 296. (*n*) C. O. R. 297.

proceed, shall give a calendar month's notice to the other party of his intention to proceed. A summons of a judge, on which no order has been made, shall not be deemed a proceeding within this rule. Notice of trial, though afterwards countermanded, shall be deemed a proceeding within it (*o*).

Impounding papers for evidence at the trial.

The Court will not order papers in the defendant's custody to be impounded until after the trial of an information against him.

An information being pending against a town clerk for misconduct in his office in a matter relating to an election of town councillors, an application was made to the Court to order the voting papers in his official custody to be impounded till after the trial, as the period for which he was bound by statute to keep them would expire before the case would come on; but the application was refused, Lord Denman, C.J., saying: "The Court never interferes in this manner to compel a defendant to produce evidence against himself. It will be matter of strong observation against the defendant if the voting papers are not kept and produced when called for at the trial" (*p*).

Change of venue.

By sect 46 of the Crown Suits Act, 1865 (28 & 29 Vict. c. 104), in any cause in which the Attorney-General on behalf of the Crown is entitled to demand as of right a trial at bar, and the Attorney-General states to the Court that he waives his right to a trial at bar, the Court on the application of the Attorney-General shall change the venue to any county in which the Attorney-General elects to have the case tried.

It was laid down by the Court of Exchequer in general terms in *R.* v. *Smith* (*q*) that in an *ex officio* information, the defendant ★ cannot obtain a change [★ 78] of venue without the consent of the Attorney-General; but the authority of this decision has been much shaken by subsequent cases.

In one case the Irish Court of Queen's Bench changed the place of trial of an *ex-officio* information, on the application of the defendant, on being satisfied that there could not be a fair trial in the place where the offence was committed, although the Attorney General opposed the application (*r*). And the same Court

(*o*) Id. 298.
(*p*) R. *v.* Nicholetts, 5 A. & E. 376.
(*q*) 2 Price, 113.
(*r*) R. *v.* Duggan, 7 Ir. Rep. C. L. 94. *Re* Smith (*ubi supra*) was not referred to in either the arguments or judgments, nor was any point made about the difference between *ex-officio* and other informations.

in another case acceded to a similar application by the Attorney-General to enter a suggestion on the roll for changing the place of trial of an *ex-officio* information (*s*).

The application is made, on affidavits entitled in the cause, to the Court or a judge in chambers for a suggestion to be entered on the record that a fair and impartial trial cannot be had in the county where the venue is laid.

The suggestion on the record need only state this fact: it need not state the facts from which the inference is drawn (*t*).

A rule *nisi* is granted in the first instance, against which the other side may shew cause as in ordinary cases.

Forms of suggestion will be found in the Appendix.

Bringing on case for trial.

In *ex-officio* informations the defendant, by 60 Geo. 3, and 1 Geo. 4, c. 4, s. 9, if the information is not brought on for trial within twelve calendar months after the plea of not guilty has been pleaded, may apply to the Court in which the prosecution is depending, for an order authorizing him to bring on the trial. If the Court sees fit to make such order, the defendant may bring on the trial accordingly, unless a *nolle prosequi* shall have been entered in such prosecution.

Twenty-one days' previous notice must be given to the Attorney- or Solicitor-General of the intention to make the application (*u*).

Previously to this enactment the Attorney-General could keep the information hanging over the head of [★ 79] the defendant as long as ★ he pleased; and it was held that the defendant could not bring it on for trial by proviso, as proviso implied laches, which could not be imputed to the Crown (*v*).

Costs if case not brought to trial.

If a private prosecutor does not proceed to trial within a year after issue joined, or if he causes a *nolle prosequi* to be entered, the Court, on motion for the same, may award the defendant his costs to the amount of the recognizance entered into by the prosecutor on filing the information (*x*).

The hardship of limiting the right of a successful defendant to the former small amount of £20 was

(*s*) R. *v.* Conway, 7 Ir. L. R. N. S. 507.

(*t*) R. *v.* Hunt, 3 B. & Ald. 444, regarded by O'Brien, J., in R. *v.* Duggan (*ubi supra*), as overruling R. *v.* Harris, 3 Burr. 1330.

(*u*) 60 Geo. 3, and 1 Geo. 4, c. 4, s. 9.

(*v*) See R. *v.* Macleod, 2 East, 202, and the earlier cases there referred to.

(*x*) C. O. R. 49.

strongly urged upon the Court in *R.* v. *Filewood* (*y*), but the Court held that it could not give more than was mentioned in the recognizance; suggesting the advisability of in future adopting some new rule, such as refusing to grant an information unless the prosecutor undertook to pay all the costs in case he did not substantiate his charge. But the same Court, in the following term, refused to exact such an undertaking from a prosecutor, saying that any alteration must be by legislative authority (*z*).

The amount of the recognizance has now been raised to £50 (*a*).

No warrant of *nisi prius* from the Attorney-General for making up a record is necessary (*b*).

Forms of record will be found in the Appendix.

Except in the case of a trial at bar the trial is conducted in the same way as an indictment for a misdemeanor at the assizes, but on the civil side of the Court, or at the *Nisi Prius* sittings of the Queen's Bench Division. Mode of trial.

In *ex-officio* informations the Attorney-General may, if so minded, demand a trial at bar (*c*). Trial at bar.

A trial at bar shall not be had except by order of the Court (*d*).

An application for a trial at bar shall be by motion for an order *nisi* except when made by the Attorney-General on behalf of the ★ Crown, when the or- [★ 80] der shall be absolute in the first instance as of course (*e*).

All orders are, during the sittings, to be made by the Court, on motion supported by affidavit; but no affidavit is necessary for an order demandable as of right by the Crown, or where it is not necessary to state matters of fact (*f*).

On making the order absolute for a trial at bar the Court may impose such terms on the applicant as to payment of costs, or otherwise, as the Court may think fit (*g*).

(*y*) 2 T. R. 145.

(*z*) R. *v.* Brooke, 2 T. R. 197; see also R. *v.* Morgan, 2 Str. 1042.

(*a*) C. O. R. 40.

(*b*) Id. 157. The old rule was that "all causes of the Queen in this Court must be tried at *The Bar*, if Mr. Attorney will not grant a warrant of *nisi prius*." *Per Curiam*, R. *v.* Banks, 6 Mod. 247.

(*c*) R. *v.* Johnson, 1 Str. 644.

(*d*) C. O. R. 160.

(*e*) C. O. R. 161. On the subject of the right of the Crown in all cases, civil or criminal, in which it is interested, to demand a trial at bar, see the learned and interesting judgment of Wills, J., in Dixon *v.* Farrer, L. R. 17 Q. B. D. 663.

(*f*) C. O. R. 253. (*g*) Id. 162.

Three copies of the roll upon which the trial is to take place shall be delivered by the applicant for the trial at bar at the Crown Office for the use of the judges four days before the day fixed for the trial (*h*).

A trial at bar may be continued *de die in diem*, or adjourned to a subsequent day at any time, in the discretion of the Court without any reference to the sittings of the High Court, and no formal order shall be drawn up for any such continued sitting or adjournment, nor shall any such order be entered on the roll (*i*).

Jury in case of trial at bar.

The Court may direct the jury to be summoned from the county in which the offence was committed or from any other county not exempt by law, at any time after joinder of issue. The order for the jury shall be lodged with the sheriff of such county in sufficient time for the jury to be summoned six days before the trial (*k*).

The order to summon the jury may be drawn up, of course, at the Crown Office, without any motion for the same (*l*).

Jury in other cases.

Writs of *venire facias* or other writs for the summoning of juries are no longer to be used; but the jury, whether special or common, shall be taken from the list of persons summoned for the sittings or assizes, and a panel shall be annexed to the record as in civil cases (*m*).

Special jury.—Either the prosecutor or the defendant [★ 81] may obtain ★ a special jury upon giving the like notice as is required in civil cases; and a Court or a judge may, at the instance of either party, order that a special jury be struck as provided for by the Juries Act, 1870 (*n*)

The order for a special jury is an order of course, which may be drawn up at the Crown Office without any motion for the same (*o*).

A form of judge's order will be found in the Appendix.

When the jury has been reduced, either party may draw up an order at the Crown Office directing the sheriff to summon that particular jury at such time and place as may be required (*p*).

By the Juries Act, 1870 (33 & 34 Vict. c. 77), s. 17, the old practice of nominating and reducing special jurors in London and Middlesex was altered; but power is reserved to the superior Courts or any judge thereof to order, if it seem expedient, that a special jury be struck according to the old practice (*q*).

(*h*) Id. 164. (*i*) Id. 165. (*k*) Id. 163. (*l*) Id. 252.
(*m*) Id. 158. (*n*) C. O. R. 158. (*o*) Id. 252. (*p*) Id. 158.
(*q*) The old practice was this: The Master of the Crown Office

★ A warrant of tales should be procured from [★ 82] the Attorney-General, in case a sufficient number of special jurors should not be in attendance at the trial (*r*). Warrant of tales.

Subpœnas *ad testificandum* and *duces tecum* are served, by either party, as in ordinary actions. Subpœnas.

Forms of subpœnas will be found in the Appendix.

An order for the examination of a witness resident here, but unable from illness to attend the trial, cannot be made (*s*).

If the information is to be tried at the assizes, the record and jury process with panels annexed are delivered to the judge's associate or marshal on the commission day, and the cause entered for trial in the usual way. Entry for trial.

The proceeding being of a purely criminal character, the prosecutor cannot obtain discovery or inspection of any documents in the defendant's possession (*t*). Discovery or inspection.

The procedure and evidence (*u*) are the same as in ordinary cases. Procedure.

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gave an appointment to nominate the jury. The rule and appointment were then served on the opposite party and on the sheriff. If both parties did not attend the appointment, after waiting half-an-hour a second appointment was made. This was peremptory, and after waiting an hour the jury might be nominated *ex parte*. Forty-eight names were drawn by ballot, and each party got a copy of the list. An appointment might then be obtained to reduce the list to twenty-four (Corner, 137, 138). The appointment if obtained *ex parte* should be served on the other side, but not on the sheriff. The reduction was effected by each party in turn striking out one name (Cole, 89, 90). If only one party attended a peremptory appointment, the Master struck out on behalf of the other. If there were several defendants the prosecutor still struck out twelve in this manner, and each of the defendants in turn struck out one, until twelve had been struck out by them. The Master would not proceed *ex parte* without an affidavit of service of the rule and appointments. Where a rule for a special jury was not proceeded with by the party who had obtained it, the other party might take out a summons to shew cause why the cause should not be tried by a common jury (R. *v.* Smith, cited Corner, 138); but if the special jury had been nominated and reduced the rule should be discharged, by consent or otherwise, before the cause could be tried by a common jury (Corner, 138, 139). If after a special jury had been struck the information was not tried at the next sittings, a rule to strike a new special jury could not be obtained: the cause must have been tried by the jury first appointed (R. *v.* Perry, 5 T. R. 453, following R. *v.* Franklin, Hil. 5 Geo. 2, 1731, there set out at length; the same being held as to civil actions in Wilson *v.* Butler, 2 M. & Rob. 78); and if there was a new trial, there must have been a new jury (Corner, 138).

(*r*) See Form of Warrant in the Appendix, *post*.

(*s*) R. *v.* Upton St. Leonards, 10 Q. B. 827.

(*t*) R. *v.* Purnell, 1 Wils. 239.

(*u*) For an example of a mandamus to an Indian Court to examine witnesses on an information pending here, see R. *v.* Douglas, 13 Q. B. 42.

The trial is on the civil side of the Court.

Neither the Attorney- or Solicitor-General, nor a queen's counsel, can appear in any case against the Crown, even if the Crown be a nominal party only, without a special license (*x*). This is obtained, by presenting a petition to Her Majesty, which is left at the Home Office. The rule does not apply to serjeants or counsel to whom patents of precedence have been given.

The defendant need not be present at the trial (*y*).

Matters of aggravation or extenuation are not entered into at the trial, but are reserved for the affidavits used when the defendant is called up for sentence (*z*).

Right of Attorney-General to reply.

In *ex-officio* informations, but not where he appears as counsel for a private prosecutor (*a*), the Attorney-General is entitled to reply, though the defendant call no witnesses; a privilege strongly but in vain opposed by Horne on his trial for libel (*b*).

[★ 83] ★ Whether a counsel who appears for the Attorney-General on an *ex-officio* information has the right of reply is not quite clear. Lord Tenterden held in *R.* v. *Marsden* (*c*) that wherever the King's counsel appears officially he is entitled to the reply (*d*). Pollock, C. B., and Mellor, J., have also extended the right to counsel representing the Attorney-General (*e*); and Kelly, C. B., at the trial of a woman named Waters at the Old Bailey for murder, decided that the learned serjeant who represented the Attorney-General was entitled to reply, even if no evidence was called for the prisoner (*f*). On the other hand, Martin, B. (*g*), and Byles, J. (*h*), held that the right was confined to the Attorney-General in person; and Martin, B., said he thought a prosecution by the Crown ought to be conducted like any other prosecution.

Amendment of variances.

By 9 Geo. 4, c. 15, power is given to the Court to amend the record in any information, where any variance appears between any matter in writing or print produced in evidence, and the recital or setting forth thereof upon the record. This power is extended by 14 & 15 Vict. c. 100, s. 1, to any variance between the state-

(*x*) See R. *v.* Jones, 9 C. & P. 404.
(*y*) 1 Gude, 101.
(*z*) R. *v.* Sharpness, 1 T. R. 228.
(*a*) R. *v.* Bell, M. & M. 440.
(*b*) 20 How. St. Tr. 660; Cowper, 672.
(*c*) M. & M. 439.
(*d*) See R. *v.* Gardner, 1 C. & K. 628.
(*e*) R. *v.* Toakley, 10 Cox, C. C. 406.
(*f*) *Ex relatione amici.*
(*g*) R. *v.* Christie, 1 F. &. F. 75.
(*h*) R. *v.* Taylor, 1 F. & F. 535.

ment in any indictment (which, by s. 30, includes informations) and the evidence offered in proof thereof, in the name or description of any matter or thing, or in the ownership of any property therein named or described, if the Court considers such variance not material to the merits of the case and that the defendant cannot thereby be prejudiced in his defence on the merits, the amendment to be made on such terms as to postponing the trial, to be had before the same or another jury, as the Court shall think reasonable; and in case the trial is had at *Nisi Prius*, the order for the amendment is to be indorsed on the postea and returned together with the record, whereupon such paper, rolls or other records of the Court from which such record issued as it may be necessary to amend shall be amended accordingly by the proper officer; and in all other cases the order for the amendment shall either be indorsed on the indictment, or shall be engrossed on parchment and filed together with the indictment among the records of the Court. This section also contains provisions as to respiting recognizances, &c.

★ The amendment must be made before— [★ 84] but may be made at any time before—verdict (*i*).

An amendment once made has in the case of indictments been held final; the indictment in its original form cannot be reverted to (*k*).

Entry by associate, clerk of assize, or master.

Upon every trial, whether at the assizes or at the sittings in London or Middlesex, the associate, clerk of assize or master is to enter in a book to be kept for that purpose, first, the verdict of the jury and all such findings of fact, if any, as the judge may direct to be entered; second, the directions, if any, of the judge as to judgment; third, the certificates, if any, granted by the judge; and the sentence of the judge if then passed (*l*).

Filing certificate.

A certificate, signed by the associate, of such verdict, finding or direction, judgment or sentence, shall be filed at the Crown Office by the associate (*m*).

A form of certificate will be found in the Appendix.

Signing judgment.

Judgment upon the postea may be entered at the Crown Office at any time after the expiration of the time limited for applying for a new trial, or for entering judgment *non obstante veredicto*, or arresting judgment, unless otherwise ordered (*n*).

(*i*) R. *v.* Larkin, Dears. 365; 23 L. J. M. C. 125; R. *v.* Frost, Dears. 474; 24 L. J. M. S. 116; R. *v.* Fullarton, 6 Cox, C. C. 194.
(*k*) R. *v.* Barnes, L. R. 1 C. C. R. 45; 35 L. J. M. C. 204; R. *v.* Pritchard, 30 L. J. M. C. 169; R. *v.* Webster, L. & C. 77.
(*l*) C. O. R. 171. (*m*) Id. (*n*) Id.

The postea may be obtained by the party in whose favour the verdict was found from the associate, clerk of assize, or master, on the day after the last day on which a motion may be made for a new trial or in arrest of judgment, or for judgment *non obstante veredicto*, unless there be an order *nisi* granted; and if an order *nisi* has been granted, at any time after such order *nisi* shall have been discharged, and shall be produced at the Crown Office, where the judgment will be entered in a book and signed on the record according to the verdict, by the Queen's Coroner and Attorney, or the Master of the Crown Office (*o*).

Forms of *postea* will be found in the Appendix.

Forms of entry of judgment upon verdict after acquittal, by default, on confession for want of joinder in demurrer, and on demurrer after argument will be found in the Appendix.

Acquittal is final.

[★ 85] ★ Should the jury acquit the defendant, the matter is determined for ever; for the Court will not grant a new trial after an acquittal upon an information or indictment, even where there has been a misdirection (*p*); the only exception being where the case is one in the nature of a civil action, such as an indictment for the non-repair of a highway (*q*).

The reason of the rule was thus stated by Lord Coleridge, C.J., in *R.* v. *Duncan* (*r*):—"The practice of the Court has been settled for centuries, and is that in all cases of a criminal kind where a prisoner or defendant is in danger of imprisonment, no new trial will be granted if the prisoner or defendant, having stood in that danger has been acquitted. The one case in which a new trial was granted in a purely criminal case, on the ground of misdirection or misreception of evidence, *R.* v. *Scaife* (*s*), was a case not of misdemeanor but of

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(*o*) C. O. R. 175.

(*p*) R. *v.* Cohen & Jacob, 1 Stark. 516.

(*q*) See per Lord Campbell in R. *v.* Russell, 3 E. & Bl. 942, 950. See also R. *v.* Crickdale, 3 E. & B. 947, note (*b*); R. *v.* Chorley, 12 Q. B. 515, note (*a*); R. *v.* Leigh, 10 A. & E. 398; R. *v.* Duncan, L. R. 7 Q. B. D. 198. Even in such cases the old practice was different. See R. *v.* Parish of Severton, 1 Wils. 298, and R. *v.* Praed, 4 Burr. 2257. Some text-books lay it down as the better opinion that the Court may grant a new trial after an acquittal in all cases of misdemeanor. There are certainly no modern cases to support this view; and so far back as the 12th Car. 2 its correctness was denied. See R. *v.* Read (1 Lev. 9; see also 2 Burr. 665); R. *v.* Mann, 4 M. & S. 337; and R. *v.* Wandsworth, 1 B. & Ald. 63.

(*r*) L. R. 7 Q. B. D. 199.

(*s*) 17 Q. B. D. 238.

felony . . . But that case took no root in our jurisprudence and has not been followed. It was explained in the Judicial Committee in *R.* v. *Bertrand* (*t*) by Sir John Coleridge shewing that the point had not been presented to the Court of Queen's Bench, and he and Sir William Erle sitting in the Privy Council evidently felt that *R.* v. *Scaife* was a case which could not be supported, and they declined to follow it."

(*t*) L. R. 1 P. C. 520.

[★86] ★ CHAPTER VII.

PROCEEDINGS SUBSEQUENT TO CONVICTION.

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Difference between *ex-officio* and other informations.

If the defendant is found guilty, then if the information be an *ex-officio* one, the Attorney-General may elect whether sentence shall be passed by the judge who has tried the case or shall be postponed to the ensuing term; whereas the sentences on all other informations must be passed by the Queen's Bench Division (*a*).

Recognizance to appear for sentence.

The defendant who is found guilty, if not under recognizance to appear to receive sentence, should give notice of bail (forty-eight hours) to the prosecutor's solicitor, and enter into a recognizance to appear to receive sentence on a day named therein or whenever he shall be thereto required. The recognizance may be entered into before a judge at Chambers or a magistrate in the county, but the defendant must be present before the judge will make an order for his discharge on bail (*b*).

Every recognizance, after acknowledgment thereof, is to be transmitted to the Crown Office and filed there (*c*).

A form of recognizance to appear for sentence will be found in the Appendix.

Bringing up defendant for judgment.

If the defendant, after conviction, is committed or [★87] detained for ★ want of bail, the prosecutor must cause him to be brought up for judgment within eight days after the time limited by Rule 166 for moving for a new trial (*d*) if the Court be then sitting, and, if the Court be not sitting, within the first eight days of the sittings next after that in which the trial was had (*e*).

(*a*) See C. O. R. 172. (*b*) Corner, 152. (*c*) C. O. R. 123.
(*d*) See next page. (*e*) C. O. R. 45.

Should the prosecutor make default in causing the defendant to be brought up for judgment within the time just mentioned, or within such further time as may have been granted by the Court or a judge for that purpose, the defendant may, on application to the Court, be discharged on his own recognizance.

A form of notice of motion for the purpose will be found in the Appendix, *post.*

Procedure where defendant not under recognizance.

If judgment on the *postea* is for the Crown or the prosecutor, and the defendant is not under recognizance to appear to receive sentence, he may be served with a four days' notice to appear on a certain day to receive the sentence of the Court, or the prosecutor may issue a writ of *capias ad satisfaciendum* to take the defendant, to remain in custody without bail or mainprize until he satisfies the judgment or obtains his discharge upon writ of error (*f*).

If the defendant be not in custody and be under recognizance to appear to receive sentence, the defendant and his bail may be served with a four days' notice, that on a day named therein the Court will be moved for judgment. Such service need not be personal (*g*).

A form of notice will be found in the Appendix.

Once arrested, the defendant will be kept in custody until final judgment and sentence, unless the prosecutor expressly consents to his being bailed; but the Court in pronouncing sentence will take this commitment into consideration, and it will go as part of his punishment (*h*).

After judgment by default.

The proceedings after judgment by default, in order to secure the appearance of the defendant for sentence, are the same as those after verdict of guilty.

[★88] ★ In case of defendant's outlawry no judgment on his conviction can be pronounced until the outlawry is reversed or set aside (*i*).

New trial.

As already stated (*k*), a new trial will not be granted where the defendant has been acquitted by the jury (*l*).

(*f*) C. O. R. 176. A form of writ of *capias ad satisfaciendum* will be found in the Appendix.

(*g*) C. O. R. 177.

(*h*) *Per* Lord Mansfield, C. J., in R. *v.* Wilkes, 4 Burr. 2539, 2545, 2574; see also *per* Lord Kenyon in R. *v.* Waddington, 1 East, 159.

(*i*) R. *v.* Wilkes, 4 Burr. 2532.

(*k*) *Ante*, p. 85.

(*l*) Corner, C. P., p. 161, adds, "unless the acquittal was obtained by *covin* or *laches*," but cites no authorities. The exception is supported by the language of the Court in R. *v.* Bear, 2 Salk. 646, where, on refusing a motion for a new trial on an indictment

Where the jury have convicted, a new trial may be moved for.

How applied for.—Applications for a new trial, or to enter judgment *non obstante veredicto*, or to arrest judgment, are to be by motion for an order nisi, made to a Divisional Court of the Queen's Bench Division (*m*).

Within what time.—In cases tried in London or Middlesex, the motion is to be made within eight days after the trial, or on the first subsequent day on which a Divisional Court shall sit to hear motions on the Crown side, or if the trial has been had at the assizes, within the first seven days after the last day of the sittings on the circuits for England and Wales: the time of the vacations shall not be reckoned in the computation of time for moving (*n*).

The time in either case may be extended by the Court or a judge (*o*).

On making the motion, all the defendants, if more than one, who are not either in custody, or who are only liable to a fine, must be present in Court, unless the Court shall otherwise order (*p*). Not even the consent of the prosecutor's counsel will excuse the absence of the defendant or defendants (*q*).

Order nisi.—The grounds upon which an order *nisi* is granted must be stated in the order (*r*).

[★89] ★A copy of such order must be served on the opposite party within four days from the time of the same being granted (*s*).

It should also be served upon the associate in order that he may retain the *postea* till the order *nisi* is disposed of.

If the Court refuse the motion or take time to consider, the defendant may be allowed to remain out on bail if the prosecutor expressly consents (*t*).

Though no defendant can move for a new trial except within the time limited, and except all convicted are present, the Court may, of its own accord, at any time

for libel, the Court said "that anciently it was never done in criminal cases where defendants have been acquitted; latterly where it has been a verdict obtained by fraud or practice, as stealing away witnesses, &c., it has been done, but never yet was done merely upon the reason that the verdict was against evidence." *Postea* Mich. 10 W. 3, B. R. *Per* Holt, C. J.: "In indictments of perjury we never do it, because the verdict is against evidence, but if you prove a trick, as no notice, &c., it is otherwise." See now *ante*, p. 85.

(*m*) C. O. R. 166. (*n*) Id. (*o*) Id. (*p*) Id. 169.
(*q*) 1 Gude, 223. (*r*) C. O. R. 167. (*s*) C. O. R. 168.
(*t*) R. *v.* Waddington, 1 East, 159.

grant a new trial if satisfied on any ground that there ought to be one (*u*); nor will it give judgment against a defendant if convinced, on any ground whatever, that he is not guilty (*x*).

Grounds.—A new trial may be granted for misdirection, or the wrongful reception or rejection of evidence, or on the ground that the verdict was contrary to evidence, or on the ground of surprise (*z*), or the misbehaviour of the jury (*a*).

The motion may be made upon affidavits and upon reading the judge's notes, or the latter only, which must be previously bespoken of the clerk to the judge who tried the cause, to be in Court when the motion is made (*b*).

The motion may be in the alternative for a new trial, or in arrest of judgment (*c*).

The case is put in the New Trial paper and comes on in the ordinary way.

Order absolute.

If the order is made absolute, a fresh notice of trial must be given as if there had been no previous trial; but continuances must be entered on the record after the plea from term to term, by award of *venire* and *distringas*, as occasion may require. There must also be a new jury (*d*).

Nolle prosequi.

The Attorney-General may enter a *nolle prosequi* on any one ★ or more of several counts on which [★ 90] the defendant has been found guilty, even after a rule *nisi* for a new trial has been obtained (*e*).

A form of entry of a *nolle prosequi* will be found in the Appendix.

Arrest of judgment.

As to the time within which and the manner in which a motion in arrest of judgment must be made, *vide* the remarks as to motion for a new trial, *ante*, pp. 88, 89.

Where the information on which a ferryman was convicted of extortion, after alleging the usual rates of charges, stated that the defendant did between such a day and such a day extort, from divers persons unknown, sums of money exceeding the ancient rate and price of passage, viz., for carrying over one man and a

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(*u*) See R. *v.* Teal, 11 East, 308; and *per* Le Blanc, J., in R. *v.* Askew, 3 M. & S. 10; R. *v.* Holt, 5 T. R. 436; R. *v.* Gough, Doug. 766.

(*x*) See R. *v.* Waddington, 1 East, 146.

(*z*) R. *v.* Whitehouse, Dear. C. C. 1. See R. *v.* Richardson, 8 Dowl. 511.

(*a*) R. *v.* Fowler, 4 B. & Ald. 273. See Hawkins P. C. book ii., chap. 47, s. 12.

(*b*) Corner, 162. (*c*) 1 Gude, 103. (*d*) Corner, 162.

(*e*) R. *v.* Leatham, 7 Jur. N. S. 674.

horse 2*d.*, and for every score of sheep 4*d.* &c., it was held bad in arrest of judgment; for every extortionate taking is a separate offence, and ought to be precisely and distinctly laid, whereas in the information a number of offences were accumulated under a general charge (*f*).

Judgment was also arrested where the information against a clerk of a market, after charging specific offences of which the defendant was acquitted, charged generally that under colour of his office he did illegally cause his agents to demand and receive of several other persons several other sums of money on pretence of weighing and examining their several weights and measures, and the defendant was found guilty on this general charge only (*g*).

As already stated (*h*), though the defendant himself should waive any objection in arrest of judgment, the Court itself will arrest judgment, if satisfied that the defendant is not guilty of any offence (*i*).

In *R.* v. *Waddington* (*k*) the question was raised whether the defendant might be admitted to bail whilst the Court took time to consider its judgment, the prosecutor offering no objection to the defendant's application. Lord Kenyon said that "unless the prosecutor consented to the defendant's remaining out on bail, it [★91] ★ was a matter of course absolutely that he should be committed; the Court had no discretion to exercise."

Respiting judgment.

In any case in which judgment may be pronounced at the trial, the judge before whom the trial shall be had may either issue an immediate order or warrant, for committing the defendant in execution, or respite the execution of the judgment on such terms as he shall think fit, and for such time as may be necessary, for the purpose of enabling the defendant to move for a new trial, or in arrest of judgment, and if imprisonment be part of the sentence, may order the period of imprisonment to commence on the day on which the party shall be actually taken to and confined in prison (*l*).

Forms of warrants to commit when sentenced at trial, and to apprehend defendant sentenced at trial, when not present at the trial, will be found in the Appendix.

(*f*) R. *v.* Roberts, 4 Mod. 101 ; 3 Salk. 201 ; Shower, 389.
(*g*) R. *v.* Robe, 2 Str. 999.
(*h*) *Ante*, p. 89.
(*i*) *Per Cur.* R. *v.* Waddington, 1 East, 146.
(*k*) *Ubi supra.*
(*l*) C. O. R. 173.

Warrant to hold to bail.

If a defendant be convicted and not sentenced at the trial, and is not under recognizance or under sufficient recognizance to appear to receive the sentence of the Court, or if it be made to appear on affidavit or otherwise that he is likely to abscond, a judge's warrant may be obtained at any time after verdict and before final judgment, and either from the judge at the trial or from a judge at Chambers, to hold him to bail, or to require him to give such further bail as the judge in his discretion may think fit, upon a certificate, if he be not under recognizance, of the conviction, to be obtained from the clerk of assize or associate, and a certificate of his not being under recognizance, from the Crown Office, or if he be under recognizance, upon a certificate of conviction and an affidavit of facts shewing the necessity of further bail (*m*).

A form of warrant to hold the defendant to bail and to appear for sentence will be found in the Appendix.

Moving for final judgment.

The *postea*, or if interlocutory judgment be upon confession, default, or *retraxit*, the entry roll, shall be in Court on moving for final judgment, and if the defendant does not answer on being called three times, the prosecutor on an affidavit of service of notice may move (under Rule 126), to estreat the recognizance, and upon the estreat of the recognizance a judge may grant a bench ★ warrant for the apprehen- [★ 92] sion of the defendant; or the prosecutor may issue a *capias* and proceed to outlawry (*n*).

If there has been a trial, the notes of the judge who tried the case should be bespoken, and an abstract or copy of the information should be prepared by the prosecutor's solicitor for the senior puisne judge who passes sentence (*o*).

Personal

As a general rule it is indispensably necessary that

(*m*) C. O. R. 174.

(*n*) C. O. R. 178. See as to outlawry before judgment, *ante*, p. 62 *seq.* The following is the procedure *after judgment*:—one writ of *capias* being issued, on a return of *non est inventus* a writ of *exigi facias* is issued [a writ of proclamation need not be issued with it] on which the defendant is exacted five times at so many distinct County Courts, or at five hustings of pleas of land in London. On a return of his being exacted five times without surrendering himself, the outlawry is complete (Cole, 98; 1 Gude. 261; Corner, 243; and see R. *v.* Perry, 6 T. R. 573; R. *v.* Wilkes, 4 Burr. 2559; R. *v.* Ward, 2 Ld. Ray. 1462; R. *v.* Hornby, 5 Mod. 61). On completion of the outlawry, the prosecutor's solicitor may issue writs of *capias utlagatum*, or special *capias utlagatum*, under which, not only may the defendant be taken, but his goods may be seized and his lands extended.

(*o*) Cole, 102; Corner, 153.

appearance of defendant when sentence pronounced.

the defendant should be personally present in Court when sentence is pronounced (*p*).

Special circumstances, shewn by affidavit, may induce the Court on motion, to dispense with this necessity; *e.g.*, in cases where it is clear that a fine only will be inflicted, in case of the sickness of the defendant, his residing a long distance from London, or the offence being of a very trifling kind (*q*).

The motion to dispense with the personal appearance of the defendant should be made early in the term.

The Court sometimes directs the order *nisi* to be [★ 93] served on the ★ prosecutor's solicitor, and if no cause is shewn the order will be made absolute on the defendant's solicitor undertaking to pay such fine as may be imposed (*q*).

Affidavits in mitigation and aggravation.

Affidavits either in mitigation or in aggravation may be used when the defendant is brought up for sentence. They are entitled, "In the High Court of Justice, Queen's Bench Division. The Queen against B." It is not usual for either party to supply copies of these to the other. They need not be filed before the motion is made.

After judgment by default, on an *ex-officio* information, the Court allowed to be read in aggravation, an affidavit entitled simply, "In the Queen's Bench," on which the Attorney-General had filed the information (*r*).

Either party may make an affidavit, and so may any of the witnesses who were examined at the trial.

When any defendant shall after verdict be brought up for sentence on any information, after the notes of the trial shall have been read, the affidavits produced on the part of the defendant, if any, shall be read, and then any affidavits produced on the part of the prosecution; after which the counsel for the defendant shall be heard; and, lastly, the counsel for the prosecution (*s*).

(*p*) R. *v.* Hann, 3 Burr. 1786. In this case "the general doctrine laid down by the Court and agreed by the counsel on both sides, was that though such a motion was subject to the discretion of the Court, either to grant or to refuse it, where it was clear and certain that the punishment would not be corporal, yet it ought to be denied in every case where it was either probable or possible that the punishment might be corporal. . . . And Wilmot and Aston, JJ., thought that even where punishment would most probably be only pecuniary, yet in offences of a very gross and public nature, the persons convicted should appear in person, for the sake of example and prevention of the like offences being committed by other persons; as the notoriety of their being called up to answer criminally for such offences would very much conduce to deter others from venturing to commit the like."—*Id.* 1787.

(*q*) 1 Gude, 107; Cole, 100.

(*r*) R. *v.* Morgan, 11 East, 457.

(*s*) C. O. R. 180.

When any defendant shall be brought up for sentence after judgment by default, confession, or *retraxit*, the prosecutor's affidavits shall be first read, then the defendant's affidavits; after which the counsel for the prosecution shall be heard, and, lastly, the counsel for the defendant (*u*).

If no affidavits are produced, the counsel for the defendant shall be first heard, and then the counsel for the prosecutor (*x*).

It is not usual to allow a defendant an opportunity of answering at a future time the affidavits of the prosecutor. Each party should come prepared to disclose all the circumstances of his case (*y*).

But if the Court, on hearing the affidavits, should be of opinion that any point was not fully and sufficiently explained, it would give the defendant an opportunity of explaining such part of the charge (*z*).

★ In a case where the prosecutor produced [★94] affidavits in aggravation, to shew a continuance of the defendant's malice, by expressions used subsequently to the time of the indictment, the Court thought it reasonable to allow the defendant an opportunity of answering these affidavits, because it could not be supposed that he could come prepared to answer that which was not contained in the indictment (*a*).

In mitigation.—The defendant may himself make an affidavit in extenuation.

A defendant convicted of publishing a libel was allowed to urge in mitigation that he was absent when the paper was published, that on reading a copy he was much hurt with the contents, immediately forbade the sale and refused to let anybody see it (*b*).

Sir Francis Burdett was allowed to put in an affidavit that he read statements in the newspapers, which induced him to publish the libel; but affidavits that those statements were founded on truth were refused (*c*).

The Court has also received affidavits stating that at the time of publication the defendant believed the charge to be true, and setting forth reasonable grounds for such belief (*d*).

(*u*) Id. 181. (*x*) C. O. R. 182.
(*y*) *Per curiam*, R. *v.* Wilson, 4 T. R. 487.
(*z*) Id.
(*a*) Id., referring to R. *v.* Archer, 2 T. R. 203, in notes.
(*b*) R. *v.* Williams, Lofft. 759.
(*c*) R. *v.* Burdett, 4 B. & Ald. 321; see also R. *v.* Bradley, 2 M. & Ry. 152.
(*d*) R. *v.* Halpin, 9 B. & C. 66.

In *R.* v. *Shimmin* (not reported), a case of newspaper libel, affidavits were received from inhabitants of the town where the paper was published, to the effect that the paper had always been well conducted and had been the means of bringing about sanitary and other reforms; but a memorial, not sworn, to the same effect was not allowed to be read.

Where there had been a plea of justification under Lord Campbell's Act, the Court admitted, for the purpose of shewing why this plea had been pleaded, an affidavit of the defendant deposing that before and at the time of publication, and at the time of pleading, he believed the truth of the charges contained in the libel and plea, and that before the pleading he had received from Viterbo, in Italy an affidavit made by a person named in the plea of justification, to the effect that she had been seduced by the prosecutor under the [★ 95] ★ circumstances mentioned in the libel (*e*). "This part of the affidavit," said Lord Campbell, C.J., "is clearly admissible under the statute to shew why this part of the plea was placed on the record; the fact of the plea being one to be considered by the Court in apportioning the punishment."

In *R. v. Mawbey* (*f*), where four persons had been indicted for conspiracy and two were acquitted, the affidavits of the two acquitted were allowed to be read in favour of the defendants who had been convicted.

Aggravation.—The prosecutor may himself make an affidavit in aggravation.

Affidavits in aggravation may be made by witnesses who were examined at the trial, as at the trial the only thing inquired into is the fact which constitutes the offence; matters of extenuation or aggravation never being entered into at that time (*g*).

The affidavits may shew that the defendant has, since the trial, by his conduct aggravated his offence; but in such cases the defendant will be allowed time to answer the affidavits (*h*).

Hearsay evidence has been admitted where the persons from whom it came refused to join in the affidavits, and were, in the opinion of the Court, under the influence of the defendant. In *R. v. Archer* (*i*) the Court received affidavits of persons to whom certain other per-

(*e*) R. *v.* Newman, 1 El. & B. 581, 582.
(*f*) 6 T. R. 627.
(*g*) R. *v.* Sharpness, 1 T. R. 228.
(*h*) R. *v.* Withers. 3 T. R. 428 ; R. *v.* Archer, 2 T. R. 203, note.
(*i*) *Ubi Supra.*

sons had related expressions used in their hearing by the defendant, confirming and aggravating his guilt, the prosecutor swearing that an application had been made to those other persons to come forward with their testimony, but that they had refused. The Court was of opinion in this case that the persons who had so refused were under the influence of the defendant (*k*).

Where a defendant pleaded guilty to an indictment for libel on condition of being discharged on entering into his own recognizance to appear and receive judgment when called on, and of not being called on if he discontinued the publication of libels upon the prosecutor, the Court refused to pass judgment unless the ★ prosecutor produced an affidavit stating that [★ 96] the defendant had, since the trial, published libels respecting him (*l*).

Notwithstanding the affidavits in aggravation, the Court will, according to Lord Kenyon, C.J. (*m*), "always take care not to inflict a greater punishment than the principal offence itself will warrant."

Sentence.

The sentence is, in the discretion of the Court, either a fine or imprisonment, or both; the defendant being, sometimes, also, required to find sureties to be of good behaviour for a fixed period.

If the misdemeanor of which the defendant has been found guilty is the publication of a defamatory libel, the term of imprisonment is, by Lord Campbell's Act (6 & 7 Vict. c. 96. ss. 4, 5) not to exceed one year unless the defendant published it knowing it to be false, in which case it is not to exceed two years.

The right of the Court to adjudge a misdemeanant to give security for his good behaviour, after the expiration of his imprisonment, was discussed before the House of Lords, on a writ of error in 1810, and the question was put to the judges: Whether, by law, the Court of King's Bench can adjudge a person convicted of misdemeanor to give security for his good behaviour for a reasonable time, to be computed from and after the expiration of his imprisonment, himself in a sum named in such judgment, with two sufficient sureties each in a sum therein also mentioned? The unanimous opinion of the judges was in the affirmative (*n*).

(*k*) See also R. *v.* Pinkerton, 2 East, 357; R. *v.* Willett, 6 T. R. 294; R. *v.* Younghusband, 4 N. & M. 850; *Ex parte* Williams, 5 Jur. 1133; R. *v.* Jolliffe, 4 T. R. 285.

(*l*) R. *v.* Richardson, 8 Dowl. 511.

(*m*) R. *v.* Withers, 3 T. R. 432.

(*n*) R. *v.* Hart and White, 30 How. St. Tr. 1344; 47 H. L. Jour. 271. The question answered by the judges, it will be observed,

In case of a conviction for publishing a blasphemous or seditious libel, the Court may order all copies of the libel to be seized, and, after final judgment, to be disposed of as the Court shall direct (60 Geo. 3 & 1 Geo. 4, c. 8, s. 1) (*o*).

The Rule of Court embodying the sentence when drawn up by the clerk of the rules in the Crown Office is forth- [★ 97] with ★ lodged with the marshal or other officer in whose custody the defendant is (*p*).

The Court refused to pass any sentence on a defendant convicted on an information for assault, where it appeared on the affidavits that the prosecutor had commenced a civil action for the same assault, although the prosecutor offered to discontinue the action (*q*).

Where judgment was given that on each of four counts of an information for libel the defendant should be imprisoned; on the first count, for the space of two months now next ensuing; on the second count, for the further space of two months, to be computed from and after the end and expiration of his imprisonment for the offence mentioned in the first count; on the third count, for the further space of two months, to be computed in like manner from the end of the imprisonment on the second count; and on the fourth count, for the further space of two months, to be computed in like manner from the end of the imprisonment on the third count; and the third count was on error adjudged to be insufficient, it was held, that the sentence on the fourth count was not thereby invalidated, and that the imprisonment was to be computed from the end of the imprisonment on the second count (*r*).

Sometimes the Court, instead of passing sentence, recommends the parties to go before the Master of the Crown Office by way of reference. If agreed to, a rule is drawn up accordingly. An appointment obtained from the master is served on the solicitor of the other side. If either party intends to appear by counsel, notice to that effect should be given. The master will make his allocatur upon the rule of reference. The

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was as to the power of adjudging security to be given for a reasonable time ; but nine years later the Court sentenced Carlisle, for two blasphemous libels, to pay a fine, to be imprisoned for three years, and to find sureties for good behaviour for the term of his natural life: R. *v.* Carlile, 3 B. & Ald. 167 ; *sed vide* Prickett *v.* Gratrex, 8 Q. B. 1029, 1030.

(*o*) See R. *v.* Cator, 2 East, 361.

(*p*) 1 Gude, 108.

(*q*) R. *v.* O'Gorman Mahon, 4 A. & El. 575.

(*r*) Gregory *v.* R., 15 Q. B. 974.

Court will enforce compliance with this by attachment, on an affidavit of service of the rule and allocatur and demand of compliance; or may grant and afterwards make absolute a rule ordering the defendant to pay whatever sum is awarded, on which execution may issue (*s*).

Respiting execution.

The Court on giving final judgment or the Court of Appeal on affirmance may, if they shall so think fit, on the application of the defendant then present, respite the execution of the ★ judgment for such time [★ 98] as may be necessary for the defendant to obtain the Attorney-General's fiat, for a writ of error, or consent for an appeal to the House of Lords upon the defendant entering into a recognizance with two sufficient sureties, upon such terms as the Court may order, to render himself into custody or to prosecute his writ of error or appeal with effect, and may order the period of imprisonment, if that be part of the sentence, to commence on the day on which the party shall be actually taken to and confined in prison (*t*).

Costs.

Prosecutor's Costs.—If the sentence on the defendant consists wholly or partly of a fine, the private prosecutor is entitled, under the writ of privy seal, to a third part thereof if his costs amount to so much; if the costs amount to more, the Lords of the Treasury may, on a petition being presented to them stating the circumstances, allow him a further part or the residue of the fine (*u*).

The procedure to obtain one-third of the fine is this:—the prosecutor's solicitor makes out and engrosses on a roll the bill of costs; the Queen's coroner, on being satisfied as to the amount, signs a certificate to that effect on the roll; on production of this to two judges of the Court, they will sign the allocatur, upon which the Queen's coroner will pay over the money, if it still remains in his hands (*x*).

If the issue on a special plea of justification to an information by a private prosecutor for libel has been found for the prosecutor, he is, by sect. 8 of Lord Campbell's Act (6 & 7 Vict. c. 96), entitled to recover from the defendant the costs sustained by the prosecutor by reason of such plea, to be taxed by the proper officer of the Court before which the information is tried. No. 50 of the New C. O. Rules is to the same effect.

(*s*) 1 Gude, 108, 109; Cole, 106, 107.
(*t*) 1 Gude, 179.
(*u*) Ib. 110, 111.
(*x*) 1 Gude, 110, 111; Corner, 126, 127.

Defendant's Costs.—Under 4 & 5 Wm. & M. c. 18, s. 2, a defendant found not guilty by the jury was entitled to his costs, as a matter of right, though the offence were notorious and the acquittal on a matter of form, unless the judge before whom the information was tried in open Court certified upon the record that there was reasonable cause for exhibiting the informa- [★ 99] tion, the effect of which was to ★ disentitle the defendant to any portion of his costs. This certificate must have been entered on the *postea* (*y*).

Where the judge has not so certified, the awarding of costs was compulsory on the Court. In *R.* v. *Woodfall* (*z*), though the judge who tried the cause certified that the verdict for the defendant was against the evidence, the Court held that, in the absence of a certificate, they had no discretion to refuse the defendant his costs. It was held unnecessary, therefore, in such a case to obtain a rule calling on the prosecutor to shew cause why he should not pay the defendant his costs: the proper course was for the defendant to take out a side bar rule for taxing the whole costs; and upon that being done, he was entitled to so much of them as equalled the amount of the recognizance (*a*).

Sect. 2 of 4 & 5 Wm. &. M. has been repealed by 42 & 43 Vict. c. 59, s. 2; but by No. 49 of the New Crown Office Rules, "if the defendant be acquitted (unless the judge at the time of trial certifies that there was reasonable cause for the information) the Court, on motion for the same, may award the defendant his costs to the amount of the recognizance entered into by the prosecutor on filing the information."

In case, however, of an information for libel by a private prosecutor, if judgment is given for the defendant, he is, by sect. 8 of Lord Campbell's Act, entitled to recover from the prosecutor the costs sustained by the said defendant by reason of such information to be taxed by the proper officer of the Court before which the information is tried (*b*). No. 50 of the New C. O. Rules is to the same effect.

Sect. 2 of 4 & 5 Wm. & M. c. 18, was held not to apply to a trial at bar (*c*); neither did that enactment apply to *ex-officio* informations (*d*). And if of several defendants some were found guilty and others acquitted,

(*y*) Comb. 345.
(*z*) 2 Str. 1131.
(*a*) R. *v.* Savile, 18 Q. B. 703.
(*b*) See R. *v.* Latimer, 15 Q. B. 1077.
(*c*) R. *v.* Clerk, 7 Mod. 47.
(*d*) See Bac. Abridg. Informations, D. 2.

it was held that those acquitted were not entitled to costs under the statute (*e*).

In cases which do not come under sect. 8 of Lord Campbell's ★ Act, the prosecutor's liability [★ 100] does not exceed the amount of his recognizance.

An application for payment of defendant's costs to the amount of the recognizance must be made upon two clear days' notice of motion, and be brought on as if it were an *ex parte* motion and not put into the Crown paper (*f*).

If it is intended to use an affidavit, a copy of it must be served with the notice of motion (*g*).

Taxation of costs.

Rule 27 (as to Special Allowances and General Regulations) of Order LXV. of the rules of the Supreme Court, 1883, is, so far as it is applicable, to apply to all criminal proceedings on the Crown side. Those Rules are too lengthy to set forth here; but they will be found in the Appendix, *post*.

Appeal as to costs.

By the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 47, it is enacted that "no appeal shall lie from any judgment of the High Court in any criminal cause or matter, save for error of law apparent upon the record."

An appeal, therefore, will not lie from an order of the High Court as to costs following on a judgment for the defendant, on an information for libel. In *R.* v. *Steel* (*h*) the defendant having been acquitted, judgment was entered for him, and the Master of the Crown Office taxed the defendant's costs pursuant to 6 & 7 Vict. c. 96, s. 8, under a side bar rule, according to the usual practice, and the High Court discharged a rule to review the taxation. It was contended, in support of the right to appeal, that the prosecutor being no party on the record, the question of costs was a quasi civil matter between him and the defendant; but the Court (Lord Coleridge, C.J., Mellish and Brett, JJ.A.) were of opinion that the order to tax was a matter of course, after judgment, although not actually part of the judgment, and that it was part of the procedure in a criminal matter, so that no appeal lay.

Error.

In case of error upon the record, the matter is brought before the Court of Appeal by writ of error, returnable before that Court (*i*).

(*e*) R. *v.* Danvers, 1 Salk. 194.
(*f*) C. O. R. 255. (*g*) Id. 256.
(*h*) L. R. 2 Q. B. D. 37.
(*i*) C. O. R. 207; see Bradlaugh *v.* The Queen, L. R. 3 Q. B. D. 607.

No writ of error lies, without the fiat of the Attorney-
[★ 101] General ★ having been first obtained (*k*). A form of fiat will be found in the Appendix.

It is now established, notwithstanding a *dictum* of Lord Mansfield's (*l*) to the contrary, that the decision of the Attorney-General as to granting or refusing his fiat is conclusive, and cannot be reviewed by the Court (*m*); though if he refused to consider the application, he might be compelled by mandamus to hear and determine it (*n*). "If it be made to appear to him," said Erle, J. (*o*), "that it ought to be granted, then *ex debito justitiæ* he is bound to grant it; if it be made to appear to him that it ought not to be granted, then *ex debito justitiæ* he is bound to refuse it; but in either case his discretion is supreme and final."

Quashing writ of error.

Though a writ of error will not be set aside on the ground that the error assigned is frivolous (*p*), the Court may quash it when satisfied that it is obtained by collusion between the parties in order to bring about a compromise of the prosecution (*q*).

Service of writ.

The writ is to be served by delivery at the Crown Office (*r*).

A form of writ of error will be found in the Appendix.

Carrying in roll.

Upon delivery of the writ of error the prosecutor is to enter the proceedings up to judgment on the roll and carry it into the Crown Office (*s*).

If the prosecutor does not, within a reasonable time, carry in the roll, the plaintiff in error may obtain a judge's order upon a summons to compel him to do so (*t*).

Certificate of allowance.

When the roll has been carried in, the plaintiff in error, on application to the Queen's coroner and attorney or the Master of the Crown Office, may obtain a memorandum or certificate of the allowance of the writ of error for service upon the defendant in error or his solicitor (*u*).

[★ 102] ★A form of certificate will be found in the

(*k*) C. O. R. 184.

(*l*) "In misdemeanors, if there be probable cause, it ought not to be denied; this Court would order the Attorney-General to grant his fiat."—R. *v.* Wilkes, 4 Burr. 2551.

(*m*) *Ex parte* Newton, 4 E. & B. 869; In *In re* Pigott (11 Cox, C. C. 311) the Irish Lord Chancellor held "that he had no jurisdiction to review the Attorney-General's decision."

(*n*) *Per* Lord Campbell, 4 E. & B. 871.

(*o*) Id. p. 872.

(*p*) R. *v.* Clarke, 7 W. R. 601.

(*q*) R. *v.* Alleyne, 4 E. & B. 186; 5 E. & B. 399.

(*r*) C. O. R. 207. (*s*) Id. 208. (*t*) Id. (*u*) Id. 209.

Appendix; also form of statement of some particular ground of error to be engrossed on copy of the certificate for service.

Transcript of record.

The plaintiff in error, within twenty days after the allowance of the writ of error, shall make a transcript of the record on parchment, and lodge it at the Crown Office. If the record be not transcribed within such time, the defendant in error may move the Court of Appeal for leave to sign judgment of *non prosequitur* at the Crown Office (*x*).

When the transcript has been lodged it shall be annexed to the writ of error, and (on a return made and signed by the Lord Chief Justice of England) delivered into the Court of Appeal by the proper officer at the Crown Office (*y*).

Assignment of error.

The plaintiff in error is, within eight days after delivery of the record into the Court of Appeal to assign errors thereon (*z*).

The plaintiff in error need not assign errors in person (*a*). He must do so by his solicitor or in person, and if in person and in custody he must be brought up into Court for that purpose upon a writ of *habeas corpus* (*b*).

If the plaintiff in error assigns errors in person, and is in custody, he shall be brought into Court, and assign errors, and move that counsel may be assigned to him, and shall then deliver to the officer of the Court in writing the assignment of errors to be filed at the Crown Office (*c*).

Upon delivery of the assignment of errors under the last preceding rule, an order of Court shall be drawn up to commit the plaintiff in error to the Queen's Prison, until the decision of the Court upon the writ (*d*).

If the plaintiff in error assigns errors by his solicitor or in person and is not in custody, he may do so by delivering the assignment of errors in writing to be filed at the Crown Office (*e*).

A form of assignment of errors will be found in the Appendix.

Order to join in error.

An order for the Attorney-General or Queen's coroner and attorney to join in error within eight days after service may be ★drawn up at the Crown [★ 103] Office and be served, with a copy of the assignment of errors on the prosecutor or his solicitor (*f*).

(*x*) C. O. R. 210. (*y*) Id. 211. (*z*) Id. 212.
(*a*) Id. 191, 214. (*b*) C. O. R. 187. (*c*) Id. 189, 214.
(*d*) Id. 190, 214. (*e*) Id. 188, 214. (*f*) C. O. R. 192, 214.

The order may be drawn up of course without motion (*g*).

Absence of joinder.

If no joinder be filed within eight days, the plaintiff in error being personally present in Court, upon a certificate of notice having been given to the Attorney- or Solicitor-General, signed by him, or on his behalf, of such intended application, may move the Court for an order *nisi* for judgment; and upon an affidavit of service of the order *nisi* upon the officer of the Court from whence error is brought, the Court may examine the record and give judgment of reversal, or such judgment as the Court from which error is brought ought to have done (*h*).

If no rejoinder be filed within eight days, and the plaintiff in error be in custody, he may be brought into Court by order if he be in the Queen's Prison, or by *habeas corpus* if elsewhere, and the plaintiff in error, or his counsel, may then move, on an affidavit of service of the order to join in error, and that on search made at the Crown Office it appears there is no joinder filed, for judgment for the plaintiff in error, and for the prisoner's discharge (*i*).

A form of entry of judgment for want of joinder in error will be found in the Appendix.

Filing joinder.

Joinder in error is to be filed at the Crown Office by the prosecutor, and a copy served on the plaintiff in error or his solicitor (*k*).

Upon filing of the joinder in error the case shall be put into the list of appeals for argument, upon application of either party (*l*).

A form of joinder in error will be found in the Appendix.

Paper books.

Two paper books for the use of the judges are to be delivered by the plaintiff in error at the Crown Office two days before the day appointed for hearing (*m*).

Recognizance.

Where a writ of error has been brought by the defendant and not by the Attorney-General, the defendant on the indictment, on obtaining his writ of error or consent for an appeal to the House of Lords, shall have [★ 104] the execution of the judgment stayed, and ★ receive back the amount of any fine levied upon him upon the judgment, and further, if in custody, shall be entitled to be discharged from imprisonment on entering into a recognizance with two sufficient sureties to prosecute the writ of error in the Form No. 127 before a judge of the High Court, or justice of the peace of the

(*g*) Id. 252 (*c*). (*h*) Id. 193, 214. (*i*) Id. 194, 214.
(*k*) C. O. R. 195, 214. (*l*) Id. 213. (*m*) Id. 197.

county, borough, or place where the defendant may be in custody: the bail to be justified in the usual manner, on twenty-four hours' notice to the prosecutor, or on such other notice as the judge, or justice of the peace, may order; provided that in the case of any defendant under legal disability, it shall be sufficient if two persons to be appointed to be approved of by such judge or justice shall become bound by such recognizance on behalf of such defendant (*n*).

Every such recognizance shall be filed at the Crown Office, and the Queen's Coroner and Attorney, or the Master of the Crown Office, shall make out and deliver a certificate sealed with the seal of the office that such recognizance is duly filed of record, which certificate shall be a sufficient warrant to the gaoler having the custody of the plaintiff in error, to discharge him out of custody and for the repayment of any fine which may have been imposed by the Court by the person having in his possession the whole or any part of the fine levied in execution of such judgment. Provided that no person who shall have received any such money and have paid it over to any other person according to the course of the Exchequer shall be liable to repay to the defendant any part of the money so paid over (*o*).

The form of recognizance will be found in the Appendix.

Estreating.

If the plaintiff in error shall make default in prosecuting the writ of error with effect or in any other way break the conditions of his recognizance, the Court may estreat the recognizance in a summary way without issuing a writ of *scire facias*, and order the writ of error to be quashed without any argument thereon, and in every such case the plaintiff in error shall forthwith be liable to execution upon the judgment (*p*).

Notice of application for judgment of reversal.

Whenever any writ of error shall be brought for the reversal of any judgment in misdemeanor and error shall be assigned thereon, ★ no judgment of [★ 105] reversal shall be entered either for want of a joinder, or otherwise, without the order of the Court in which such writ of error shall be pending, pronounced in open court, and upon a certificate, signed by or on behalf of the Attorney- or Solicitor-General, that notice has been given to one of them of such intended application; and if there be no joinder in error such Court may proceed to examine the record in error, and give such judgment thereon as the Court from which error is brought ought

(*n*) C. O. R. 199. 214.
(*o*) C. O. R. 200, 214.
(*p*) Id. 201, 214.

to have done, although no joinder in error may have been filed (*q*).

Forms of entry of reversal and of affirmance of judgment on writ of error will be found in the Appendix.

Effect of repayment of fine where conviction is affirmed.

Whenever the judgment against a plaintiff in error shall have been for the payment of a fine, and imprisonment until such fine be paid, either with or without imprisonment for a certain time, and the plaintiff in error shall have paid the fine, or the same or any part thereof shall have been levied and shall have been received back under the provisions of rules 199 and 200, and the judgment upon writ of error brought shall be affirmed, the plaintiff in error shall not be entitled, by reason of such payment as aforesaid, to be discharged from imprisonment, notwithstanding the expiration of any certain time of imprisonment for which the original judgment shall have been given, until the fine shall be again paid (*r*).

Warrant to apprehend and imprison.

When a recognizance on bail in error shall have been estreated, or judgment been affirmed, or writ of error been quashed, on an affidavit or a certificate of the proper officer of the Court to any such effect, and that default has been made for the space of four days in rendering the plaintiff in error to prison, a judge at Chambers may issue his warrant to cause the defendant to be apprehended and imprisoned pursuant to and in execution of the judgment, on an *ex parte* application by the prosecutor (*s*).

How duration of imprisonment is to be reckoned.

Whenever a plaintiff in error shall be committed by the Court in execution of the judgment given against such plaintiff in error, and whenever a plaintiff in error shall, by virtue of any warrant or in other manner, be rendered to prison in execution of such judgment, the imprisonment (if imprisonment shall not have commenced under such execution) shall be reckoned to begin [★ 106] from the day ★ when such plaintiff in error shall be in actual custody in the prison in which he may have been adjudged to be imprisoned under such judgment; and if the plaintiff in error shall have been discharged from imprisonment on giving bail in error, as in these rules before mentioned, such plaintiff in error shall be imprisoned for such further period in the same prison as with the time during which such plaintiff in error may already have been imprisoned under such execution shall be equal to the period for which he was adjudged to be imprisoned as aforesaid (*t*).

(*q*) C. O. R. 202, 214.
(*r*) C. O. R. 203, 214.
(*s*) C. O. R. 204, 214.
(*t*) C. O. R. 205, 214.

Payment of costs of apprehension.

Whenever default shall have been made in rendering a plaintiff in error to prison in execution of a judgment for misdemeanor, and a warrant shall have been issued against such plaintiff in error to enforce such render to prison, according to the provisions of these rules, such plaintiff in error shall be liable to pay the costs and charges of such render; and if the prosecutor shall, before the expiration of the plaintiff in error's imprisonment, have caused the amount of such costs and charges to be ascertained by one of the masters at the Crown Office, and shall have left with the said plaintiff in error, and with the keeper of the prison or his deputy, a certificate under the hand of such master, of the amount of such costs so ascertained, then the said plaintiff in error shall not be discharged out of custody until such costs and charges shall have been paid, or until an order for such discharge has been made by a Court exercising bankruptcy jurisdiction (*u*).

The plaintiff in error need not have counsel assigned to him, or, if in custody, be present at the hearing of the case or when judgment is given, unless the Court shall otherwise order (*x*).

Judgment of Court of Appeal.

Upon the judgment of the Court of Appeal being pronounced in favour of the plaintiff in error, the Court may either pronounce the proper judgment, and order his discharge if in custody, or remit the record to the Queen's Bench Division, to be dealt with according to law (*y*).

House of Lords.

By the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), s. 11, error to the House of Lords was abolished, and an appeal by petition substituted for it (s. 4), which lies from every order or judgment of Her Majesty's Court of Appeal in England or of any ★ Court in [★ 107] Ireland from which error or an appeal at or immediately before the commencement of this Act lay to the House of Lords by common law or by statute (s. 1).

By s. 10 an appeal shall not be entertained by the House of Lords without the consent of the Attorney-General or other law officer of the Crown in any case where proceedings in error or an appeal could not previously have been had in the House of Lords without the fiat or consent of such officer.

A form of appeal by petition to the House of Lords will be found in the Appendix.

The Standing Orders of the House of Lords regulating the procedure on appeals will also be found in the Appendix.

(*u*) Id. 206, 214.
(*x*) C. O. R. 191, 214.
(*y*) Id. 215.

[★108] ★PART II.

QUO WARRANTO INFORMATIONS.

CHAPTER I.

ORIGIN OF THE JURISDICTION.

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Origin of jurisdiction.

THE jurisdiction in *quo warranto* is, beyond doubt, of common law origin, notwithstanding the very early statutes on the subject which some persons have regarded as creating it.

Writ of *quo warranto.*

The ancient writ of *quo warranto* (now obsolete) was, according to Blackstone (*a*), "in the nature of a writ of right for the king, against him who claims or usurps any office (*b*), franchise or liberty, to inquire by what authority he supports his claim, in order to determine the right." It lay also "in case of non-user or long neglect of a franchise or mis-user or abuse of it; being a writ commanding the defendant to shew by what warrant he exercises such a franchise, having never had any grant of it, or having forfeited it by neglect or abuse" (*c*).

(*a*) Book iii. c. 17, s. 5; Finch, L. 322; 2 Inst. 282.

(*b*) The necessary qualifications of this general statement will be pointed out, *post*, pp. 127 *seq.*

(*c*) Blackst., *ubi supra*. "A corporate franchise is a species of incorporeal hereditament, in the nature of a special privilege or immunity, proceeding from the sovereign power, and subsisting in the hands of a body politic, owing its origin either to express grant, or to prescription which presupposes a grant. It follows, therefore, that the sovereign power has the right at all times to inquire into the method of user of such franchise, or the title by which it is held, and to declare a forfeiture for mis-user or non-user, if sufficient cause appears, or to render judgment of ouster if the parties assuming to exercise the franchise have no title thereto. And it may be stated as a general rule, that whenever

★ The writ originally issued out of Chan- [★ 109] cery, and was made returnable before the King's Justices at Westminster (*d*); but afterwards only before the justices in eyre, by virtue of the statutes of *quo warranto* 6 Edw. 1, c. 1 and 18 Edw. 1, st. 2 (*e*). Since those justices gave place to the king's temporary commissioners of assize, the judges on the several circuits, the writs of *quo wrranto* (if brought at all) had to be prosecuted and determined before the King's Justices at Westminster (*f*).

The judgment on the old writ of *quo warranto* being final and ★ conclusive, even against the [★ 110] Change from writ to information.

there has been a mis-user or non-user of corporate franchises, which are of the very essence of the contract between the sovereign power and the corporation, and the acts complained of have been repeated and wilful, they constitute just ground for a forfeiture in proceedings upon an information" (High's Extraordinary Remedies, 515).

(*d*) Old Nat. fol. Brev. 107, ed. 1534.

(*e*) According to Coke (2 Inst. 280) the Act of 6 Edw. 1 (known as the Statute of Gloucester) was passed to remedy certain grievances caused by the king, having, when wanting money, previously yielded to the evil counsel of certain *innovatores* who persuaded him that few or none of the nobility, clergy, or commonalty that had franchises of the grants of the king's predecessors had right to them, for that they had no charter to shew for the same, for that in truth most of their charters, either by length of time or injury of wars and insurrections, or by casualty, were either consumed or lost; whereupon (as commonly new inventions have new ways) it was openly proclaimed that every man that held those liberties or other possessions by grant from any of the king's progenitors, should before *certain selected persons* thereunto appointed shew *quo jure, quove nomine ill' retinerent, &c.;* whereupon many that had long continued in quiet possession were taken into the king's hands.

For these "certain selected persons" the statute substituted the king's justices in eyre, of whose coming proclamation was to be made forty days before, to all who claimed to have any "liberty" (franchise). The "liberties" of those who did not come before the justices in eyre were taken into the king's hand in name of distress by the sheriff, but might be replevied. In the case of those who came in, the statute provided a method of having the title to their franchise determined.

Great delay as well as great charge to the subject being caused by the judges declining to proceed to judgment without being certified *de voluntate regis* by the writ *de libertatibus allocandis*, the "*Statutum novum de warranto*" of 18 Edw. 1 was passed, enacting amongst other things that pleas of *quo warranto* should from thenceforth be pleaded and determined in the circuit of the justices, and that all pleas then depending should be adjourned into their own shires (*sic*) until the coming of the justices into those parts. This Act also confirmed the title to any "liberties" for which the claimant could produce a charter, or which he could shew that he and his ancestors had used from before the time of Richard I. (2 Inst. 493 *et seq.*).

(*f*) 3 Bl. c. 17, s. 5; 2 Inst. 498.

Crown (*g*), this, together with the length of its process probably occasioned, according to Blackstone (*h*), that disuse into which it has now fallen, and led to the introduction of the modern method of prosecution by *information* in the nature of a *quo warranto*, wherein the process is speedier and the judgment not quite so decisive; this, properly a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise as to oust him or seize it for the Crown, having long been applied to the mere purposes of trying the civil right, seizing the franchise, or ousting the wrongful possessor, the fine being nominal merely.

The time when the change took place is not exactly determined; but the general opinion is that it was about the time when judges of assize succeeded to the functions of the justices in eyre (*i*), which Sir Matthew Hale thinks was about the 10 Edw. 3 (*k*), but Coke considers to have been considerably later (*l*).

Difference between ancient and modern procedure.

The proceeding by means of the old writ (*m*) was a purely civil one, and a judgment against the defendant involved only the seizure of the franchise into the king's hand to be granted out again to whomsoever he pleased; or, if it were not such a franchise as might subsist in the hands of the Crown, there was merely judgment of *ouster* to turn out the party who usurped it (*n*). The procedure by information, on the other hand, was at first regarded as a criminal proceeding, involving fine and imprisonment as well as ouster of the defendant from the franchise he had usurped. It has, however, long since ceased to possess this character, and is now, as already stated, only used to settle a question of civil right (*o*).

(*g*) R. *v.* Trinity House, Sid. 86; R. *v.* Carpenter, 2 Show. 47; *Anon.*, 12 Mod. 225; 3 Bl. c. 17, s. 5.

(*h*) *Ubi supra.*

(*i*) "Now when justices in eyre ceased," says Coke, in dealing with the *statutum novum de quo warranto*, "then this branch, for the ease of the subjects and for saving of their costs, charges and expenses, lost its effect; for with justices in eyre this branch lived and with them it died" (2 Inst. 498).

(*k*) Hist. of Com. Law, 168 (Ed. 1716).

(*l*) See 2 Inst. 498.

(*m*) The original writ of *quo warranto* is still recognized and employed as an existing remedy in some of the United States of America. See cases cited, High's Extraordinary Remedies, p. 475.

(*n*) 3 Bl. c. 17, s. 5; Cro. Jac. 259; 1 Show. 280.

(*o*) The judgment in the former case was to seize the franchise in *manibus regis*, that on an information to oust the defendant of the particular franchise: R. *v.* Mayor of Hertford, 1 Salk. 374.

★ Even its nominally criminal character [★ 111] has recently been taken away by 47 and 48 Vict. c. 61, s. 15, which enacts that "proceedings in *quo warranto* shall be deemed to be civil proceedings whether for purposes of appeal or otherwise."

In the case of the writ of *quo warranto*, on default of appearance, the franchises were seized; but in the procedure by information there could not be a seizure on the *venire facias*, but only after the *distringas* had issued: *Anon.*, 3 Salk. 104; R. *v.* Trinity House, Sid. 86.

[★ 112] ★CHAPTER II.

VARIOUS KINDS OF INFORMATIONS AND THE STATUTES RELATING TO THEM.

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Various kinds of informations.

Quo warranto informations are of two kinds, those filed *ex-officio* by the Attorney- or Solicitor-General on behalf of the Crown, and those allowed by the Court to be exhibited by the Master of the Crown Office on the relation of some private individual.

Ex officio informations are filed by the Attorney-General in his own name, without any relator, without leave of the Court, and without any recognizance. Those exhibited by leave of the Court in the name of the Master of the Crown Office, as Her Majesty's attorney and coroner, are at the instance of some relator, who must enter into the recognizance required by 4 & 5 Will. & M. c. 18.

Of this last kind there are two classes, viz. (1) those relating to corporate franchises, which are the most numerous class, and to which alone the Act of 9 Anne, c. 20, applies; and (2) all others exhibited at the instance of private relators. In what respects the procedure in one of these two classes differs from that in the other will be pointed out *post*. (*See* Chapter V. on Procedure.

For a long time the only informations filed of which we have any record, were *ex-officio* informations. The first reported case of an information exhibited by the coroner and attorney of the Sovereign (the Master of the Crown Office) is that of *R.* v. *Mayor of Hertford* (*a*) in the 10 Will. 3. It is now well settled, however, that such informations do not, as sometimes [★ 113] supposed, owe their ★origin to the statute of 9 Anne, c. 25 (c. 20, Ruff.) (*b*), though that statute

(*a*) 1 Salk. 374; 1 Lord Ray, 426.

(*b*) See *per* Tindal, C.J., in Darley *v.* The Queen, 12 Cl. &

lets in every person, by leave of the Court, to make use of the name of the coroner and attorney for the purpose of prosecuting usurpers of franchises (*c*).

4 & 5 Will. & M. c. 18 restrained the coroner and attorney from exhibiting, receiving, or filing an information for trespasses, batteries, or *other misdemeanors*, without leave of the Court, and from issuing any process thereupon without taking a recognizance from the person procuring the information; a statute which, a few years after its passing, was held (12 Wm. 3) to apply to informations *quo warranto* (*d*), for "the information might be as vexatious in this case as in trespass or battery" (*e*). "As to these informations [*quo warranto*] not being for misdemeanors," said Lord Hardwicke in a later case (*f*), "it is now too late to make that objection, since the practice has been always otherwise." 4 & 5 W. & M. c. 18.

The Act was passed (to adopt the language of Wilmot, J., in *R.* v. *Marsden* (*g*)) to prevent the Master of the Crown Office from vexing and oppressing the subject, and intrusted the Court with the power of inspecting the filing of informations and seeing that he did not exercise his power to the oppression of the subject, or without sufficient ground and foundation: it was made to check and control the power of the Master of the Crown Office; not to give him a right to exercise a power which he never exercised before.

The subsequent statute of 9 Anne, c. 25 (c. 20, Ruff.), was not, like that of 4 & 5 W. & M. c. 18, a restraining but an enabling Act; being passed "for rendering the proceedings upon writs of mandamus and informations in the nature of a *quo warranto* more speedy and effectual, and for the more easy trying and determining the rights of offices and franchises in corporations and boroughs." 9 Anne c. 25 (c. 20, Ruff.).

★ It recites that "divers persons have of [★ 114] late illegally intruded themselves into, and have taken upon themselves to execute the offices of mayors, bail-

Fin. 537. "As to this mode by information, the objection to it is strong, that no such information can be filed here under the statute 9 Anne, and that all other informations ought to be filed by the Attorney-General; but those informations did exist before the statute of Anne:" *per* Lord Mansfield, C.J., in R. *v.* Gregory, 4 T. R. 240, note; see also R. *v.* Williams, 1 Burr. 402, and R. *v.* Highmore, 5 B. & A. 771.

(*c*) See *per* Wilmot, J., in R. *v.* Trelawney, 3 Burr. 1616.

(*d*) R. *v.* Mayor, &c., of Hertford, 1 Salk. 376; Carth. 503.

(*e*) Ib. See also R. *v.* Morgan, 2 Str. 1042.

(*f*) R. *v.* Howell, Cas. temp. Hardwicke, 247.

(*g*) 3 Burr. 1817.

iffs, portreeves, and other offices, within cities, towns corporate, boroughs, and places within that part of Great Britain called England and Wales, and where such offices were annual offices, it hath been found very difficult, if not impracticable, by the law now in force, to bring to a trial and determination the right of such persons to the said offices, within the compass of the year; and where such offices were not annual offices, it hath been found difficult to try and determine the right of such persons to such offices before they have done divers acts in their said offices prejudicial to the peace, order, and good government within such cities, towns corporate, boroughs, and places wherein they have respectively acted."

Sect. 4 enacts "that in case any person or persons shall usurp, intrude into, or unlawfully hold and execute any of the said offices or franchises, it shall and may be lawful to and for the proper officer in each of the said respective Courts (*h*), with the leave of the said Courts respectively, to exhibit one or more information or informations in the nature of a *quo warranto*, at the relation of any person or persons desiring to sue or prosecute the same, and who shall be mentioned in such information or informations to be the relator or relators, against such person or persons so usurping, intruding into, or unlawfully holding and executing any of the said offices or franchises, and to proceed therein in such manner as is usual in cases of information in the nature of a *quo warranto;* and if it shall appear to the said respective Courts that the several rights of divers persons to the said offices or franchises may properly be determined on one information, it shall and may be lawful for the said respective Courts to give leave to exhibit one such information against several persons, in order to try their respective rights to such offices or franchises; and such person or persons against whom such information or informations in the nature of a *quo warranto* shall be sued or prosecuted, shall appear and plead as of the same term or sessions in which the said information or informations shall be filed, un-
[★ 115] less the Court where such ★ information shall be filed, shall give further time to such person or persons, against whom such information shall be exhibited, to plead; and such person or persons, who shall sue or prosecute such information or informations in the na-

(*h*) *I. e.* the Court of Queen's Bench, the Courts of Sessions of Counties Palatine, or any of the Courts of Grand Sessions in Wales (s. 2).

ture of a *quo warranto*, shall proceed thereupon with the most convenient speed that may be; any law or usage to the contrary thereof in any wise notwithstanding."

It is further enacted by s. 5 "that in case any person or persons against whom any information or informations in the nature of a *quo warranto* shall in any of the said cases be exhibited in any of the said Courts, shall be found or adjudged guilty of an usurpation or intrusion into, or unlawfully holding and executing any of the said offices or franchises, it shall and may be lawful to and for the said Courts respectively, as well to give judgment of ouster against such person or persons, of and from any of the said offices or franchises, as to fine such person or persons respectively, for his or their usurping, intruding into, or unlawfully holding and executing any of the said offices or franchises; and also it shall and may be lawful to and for the said Courts respectively to give judgment, that the relator or relators, in such information named shall recover his or their costs of such prosecution; and if judgment shall be given for the defendant or defendants in such information, he or they, for whom such judgment shall be given, shall recover his or their costs therein expended against such relator or relators; such costs to be levied in manner aforesaid."

To what offices the Act of 9 Anne applies.

The Act applies only to corporate offices in corporate places (*i*).

The franchises mentioned in the Act mean only corporation rights or rights to freedom in corporations (*k*). The Act does not extend generally to all offices or franchises exercised without authority from the Crown within a corporation; it was meant to be confined to such franchises as were claimed in instances affecting those rights between party and party (*l*).

And it regulates only the procedure against individuals who usurp such franchises, not proceedings against the corporation itself (*m*), or against a private company (*n*).

Place must be a corporate one.

★ The word "places" in the Act means [★ 116] places of the same kind with those before enumerated, *i.e.*, corporate places. Therefore the Act was held not to apply to the case of a constable (*o*), nor to that of

(*i*) *Per* Bayley, J., R. *v.* McKay, 5 B. & C. 646. See also *per* Blackburn, J., R. *v.* Backhouse, 7 B. & S. 921.

(*k*) *Per* Denison, J., in R. *v.* Williams, 1 Burr. 408.

(*l*) *Per* Lord Mansfield, C.J., *id.* 407.

(*m*) Id. See also R. *v.* Ogden and Others, 10 B. & C. 230; R. *v.* Taylor, 11 A. & E. 949.

(*n*) R. *v.* Richardson, 9 East, 469.

(*o*) R. *v.* Wallis, 5 T. R. 375.

bailiff (*p*), nor to that of portreeve (*q*) of a town which was not a corporate one; nor to the case of a member of a local board of health (*r*); nor to that of a coroner appointed by the council of a borough under s. 62 of the Municipal Corporations Act, 5 & 6 Will. 4, c. 76 (*s*).

Also the office.

The office, as well as the town, must also be a corporate one. On this ground the office of registrar and clerk of the Court of Requests in a corporate town was held not to come within the Act (*t*); and the same doctrine was applied to the holding of a Court of Record (*u*).

An office is not a corporate one merely because a corporation appoints to it. Thus a coroner for a borough appointed by the council of the borough under 5 & 6 Will 4, c. 76, was held not to be a corporate officer within the statute of Anne. Though appointed by the corporation, he was not their officer; he was the Queen's officer, and his duties were entirely independent of the corporation (*x*).

Claim to an office which does not exist.

The question was raised in one case whether the Act of 9 Anne, c. 20, applied to a claim to a corporate office which had no existence. It was unnecessary to decide the point; but Pollock, C.B., and Bramwell, B., were very strongly of opinion that a person was equally within this statute whether he intruded into a real corporate office or claimed to exercise an office which in reality did not exist; and the other members of the Exchequer Chamber appear to have taken the same view (*y*) Littledale, J., had expressed a similar opinion in a former case: "A man may be liable to a *quo warranto* information for acting as if he were an officer, [★ 117] if the ★office, though not existing in the particular instance, is one known to the country at large, and he pretends to exercise it" (*z*).

32 Geo. 3, c. 58.

The Act of 32 Geo. 3, c. 58, which applies also only to corporate offices and franchises of a corporate nature in corporate places (*a*), was passed to limit the time for

(*p*) R. *v.* McKay, 5 B. & C. 640.
(*q*) R. *v.* Richardson, 9 East, 469.
(*r*) R. *v.* Backhouse, 7 B. & S. 911.
(*s*) R. *v.* Grimshaw, 5 D. & L. 249.
(*t*) R. *v.* Hall, 1 B. & C. 237.
(*u*) R. *v.* Williams, 1 Burr. 408.
(*x*) R. *v.* Grimshaw, 5 D. & L. 249; 17 L. J. Q. B. 19.
(*y*) Lloyd *v.* The Queen, 2 B. & S. 656; 31 L. J. Q. B. 208. The information was for exercising the office of mayor of Bala, and with two other persons, the powers and privileges of a body corporate, by the name and description of the mayor and bailiffs of the borough of Bala.
(*z*) R. *v.* Thomas, 8 A. & E. 188. See the case cited from *The Times*, *post*, p. 221.
(*a*) R. *v.* Richardson, 9 East, 469; R. *v.* McKay, 5 B. & C. 640; R. *v.* Attwood, 4 B. & Ad. 481.

taking proceedings; and it fixed the period at six years. But the whole of this Act has been repealed by s. 5 (Sched. I.) of the Municipal Corporations Act, 1882 (*b*), as to all boroughs within the latter Act. Sect. 225 of the Act of 1882 reduces the time for applying for a *quo warranto* information against a person claiming to hold a corporate office to twelve months from the time when the defendant became disqualified after election; and s. 87 substitutes another remedy in lieu of information, in cases of disqualification existing at the time of election.

What information can be filed only by the Attorney-General.

There are certain cases in which, though the procedure by *quo warranto* information is the proper course to pursue, yet a private relator will not obtain leave to exhibit one.

An information against a corporation as a body can only be filed by the Attorney-General *ex-officio* (*c*).

"If any number of individuals," says Lord Tenterden, "claim to be a corporation without any right so to be, that is an usurpation of a franchise; and an information against the whole corporation as a body, to show by what authority they claim to be a corporation, can be brought only by and in the name of the Attorney-General" (*d*).

In *R.* v. *The Corporation of Carmarthen* (*e*) an application for an information against the corporation as a body having been refused to a private relator on the ground just mentioned, the Court acceded to an application on his behalf for rules against the several individual members of the corporation; but in the subsequent case of *R.* v. *Ogden* (*e*) the Court discharged a single rule ★ which had been obtained against [★ 118] five individuals by name, Lord Tenterden using the language just cited (*f*).

Nor will a private relator be allowed to question the validity of the corporation's charter by means of a *quo warranto* information against one of its officers (*g*). "To attack a charter granted by the Crown," said Lord Denman, C.J., "through an officer appointed under it,

(*b*) 45 & 46 Vict. c. 50.

(*c*) R. *v.* Corporation of Carmarthen, 2 Burr. 869; R. *v.* Ogden, 10 B. & C. 230; R. *v.* Taylor, 11 A. & E. 949.

(*d*) R. *v.* Ogden, *ubi supra;* see also R. *v.* Trevenen, 2 B. & Ald. 482.

(*e*) *Ubi supra.*

(*f*) Bayley, J., added the further reason that the franchise usurped was of a mere private nature, not connected with public government. See also on this point *per* Patteson, J., in R. *v.* White, 5 A. & E. 618. See and distinguish R. *v.* Parry, 6 A. & E. 810.

(*g*) R. *v.* Taylor, 11 A. & E. 949.

is a new proceeding; and I think we ought not to call on the officer to defend the act of the Crown in granting the charter;" and Patteson, J., pointed out the distinction between the case in which a corporation was acknowledged to exist, but the right to an office within it only was called in question, and that in which the charter itself was called in question. It was held, however, in a later case to be no valid objection to the proceeding by an individual relator against a particular member (the mayor) of a corporation that the defect charged against the defendant's title would apply equally to that of every other member of the corporation (*i*). In this case the two earlier cases of *R.* v. *Corporation of Carmarthen* and *R.* v. *Ogden* were distinguished, the application in the former case being in terms against the corporation itself, and in the latter case against a number of individuals for acting as a corporation (*k*).

It was attempted in one case (*l*), by *quo warranto* against the mayor, to attack the validity of a charter which, it was alleged, had not been granted on the petition of a majority of inhabited householders in the borough; but the Court refused a rule, on the authority of *R.* v. *Taylor*, above referred to.

The general rule was given a still wider application in the more recent case of *R.* v. *Staples* (*m*), being extended to the case of bodies declared to be bodies corporate by Act of Parliament; *e.g.*, local boards of health. "The principle," said Cockburn, J., "which has been laid down as to granting an information in the nature of a *quo warranto* in the case of a corporation under [★ 119] charter from the ★ Crown applies to this, which is an analogous case. When a body, whether corporate or not, is created by the Legislature for public purposes, and the statutory powers of that body are usurped, we should require the intervention of the Attorney-General" (*n*).

In refusing an information for making a private rabbit-warren, Lord Hardwicke said: "We do grant these informations for public usurpations on the Crown, but never for private usurpations of franchises; but the way is to apply to the Attorney-General in such cases. So I remember my Lord Barrington's case, when I was Attorney-General, who had set up a fair, and the Court

(*i*) R. *v.* White, 5 A. & E. 613.
(*k*) See also Lloyd *v.* Reg., 31 L. J. Q. B. 209.
(*l*) R. *v.* Jones, 8 L. T. N. S. 503.
(*m*) 9 B. & S. 928, note (*a*). (*n*) Id. 929.

was applied to for one of those informations, but refused it, and directed an application to the Attorney-General, and they did accordingly, (*sic*) and I granted it; but I would not by this be understood to give an opinion that a *quo warranto* lies for this, as if it was a free warren" (*o*).

It is doubtful whether a private relator could obtain a *quo warranto* information for the holding of a fair (*p*).

The most famous historic instances of *quo warranto* informations filed *ex officio* by the Attorney-General are those filed in the reign of Charles II. against the various corporations of the country which were obnoxious to the Crown, beginning with the City of London. Two misdemeanors were alleged against the corporation of the city, viz: (1), the imposition, by virtue of an ordinance or bye-law, of certain tolls on goods brought into the city markets, and (2) their petition to the king for the summoning of parliament and the publication of the petition throughout the country: and a judgment of forfeiture was obtained from the King's Bench. This was followed by similar judgments obtained in numerous other cases from the judges of assize. The notorious Jeffreys in particular "made all the charters, like the walls of Jericho, fall down before him, and returned laden with surrenders, the spoils of towns" (*q*). No less than eighty-one *quo warranto* informations are said to have been filed against municipal corporations during the reigns of Charles II. and James II.

The judgment against the corporation of the City of London was reversed as illegal and arbitrary, by 2 W. & M. c. 8 (sess. 1) s. 2, ★ and it was declared [★120] and enacted (s. 3) that the mayor and commonalty and citizens should forever after continue a body corporate and without any seizure or forejudger of their franchises, liberties, or privileges on pretence of any forfeiture or misdemeanor (*r*).

(*o*) Ibbotson's case, Cas. temp. Hardwicke, 261.

(*p*) See R. *v.* Marsden, 3 Burr. 1812.

(*q*) North, Examen. 626.

(*r*) "In America it is believed that no instances can be found where the charter or franchises of a municipal corporation have been forfeited or seized upon proceedings in *quo warranto*, on account of misconduct of corporate officers. The privileges and franchises granted by charters to municipal bodies, under the American system, are deemed rather for the benefit of the people of the municipality than for its officers or for the corporation as such. Hence the Courts will not permit usurpations on the part of municipal officers, or contests between such officers, as to their relative functions and powers to be used as the foundation for proceedings in *quo warranto* to forfeit the franchises of the municipality." (High, § 680).

[★121] ★ CHAPTER III.

IN WHAT CASES GRANTED.

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General rule. THE procedure by *quo warranto* information is appropriate wherever there has been an usurpation of any office, whether created by charter alone or by the Crown with the consent of Parliament; provided the office be of a public nature and a substantive office, not merely the function or employment of a deputy or servant held at the will and pleasure of others (*a*).

Before the case of *Darley* v. *The Queen* (*b*) there had been a conflict of judicial opinion on the question whether an information in the nature of a *quo warranto* would lie for the usurpation of an office not created by charter but by Act of Parliament. The House of Lords in that case adopted the opinion of the judges delivered through Tindal, C.J., viz., that there is no difference between an office created by charter and one created by Act of Parliament: in both cases the assent of the Sovereign is necessary; and whether this is given by charter or by assent to an Act of Parliament passed by both branches of the Legislature is altogether immaterial (*c*).

The rule, as previously understood, was that *quo warranto* was not the remedy unless there was an usurpation actually upon the Crown. This has now been altered, and a rule of much less definite character, and one more difficult of appplication, has been substituted (*d*).

[★122] ★ The procedure has been most frequently

(*a*) *Per* Tindal, C.J., in Darley *v.* The Queen, 12 Cl. & F. 541, 542.

(*b*) *Ubi supra.*

(*c*) *Per* Lord Lyndhurst, p. 543.

(*d*) See *per* Coleridge, J., in R. *v.* Guardians of St. Martin's, 17 Q. B. 162.

employed to determine disputed questions of right to municipal offices and franchises.

It may also be had recourse to in cases of non-user or long neglect of a franchise, or mis-user or abuse of it (*e*).

Grant or refusal discretionary.

The grant or refusal of a *quo warranto* information is in the discretion of the Court. In exercising this discretion regard will be had to the circumstances of each particular case. "It would be very grievious," said Lord Mansfield (*f*), "if the information should go of course; and it would be a breach of trust in the Court to grant it as of course. On the contrary, the Court are to exercise a sound discretion upon the particular circumstances of every case" (*g*).

Distinction between *quo warranto* and mandamus.

The distinction between the class of cases in which the appropriate remedy is by *quo warranto*, and that in which the procedure by mandamus is to be adopted, cannot be too clearly kept in mind.

Wherever the office is full *de facto*, the proper method of proceeding is by *quo warranto* to oust the occupant, if he is not in possession *de jure*. And the office is full *de facto* though the election to it was illegal, provided it was a real and not merely a colourable election. If, on the other hand, the election was merely colourable, so as to be really no election at all, it does not confer even a *de facto* possession; and the remedy of the person ousted by it is not *quo warranto*, but mandamus (*h*).

"We may assume," said Wightman, J., in *Frost* v. *Mayor of Chester* (*i*), "that the office is not full *de jure;* and for the purpose of the present argument we may assume that the election has been holden in a way not warranted by law, and is therefore bad, and such as could not be supported on *quo warranto*. But the office is not the less full *de facto*, and the party elected has been ★ admitted. I think, therefore, that a [★ 123] plenarty has been shown, and that the question can be tried only by *quo warranto*."

(*e*) 3 Bl. C. 17. In an old case, the procedure was adopted to try the right of the Master and Wardens of Trinity House to take sand in the Thames for ballast under a grant from the Crown. See Reg. *v.* Trinity House, Sid. 86.

(*f*) R. *v.* Wardroper, 4 Burr. 1964.

(*g*) See also R. *v.* Dawes, 4 Burr. 2022, and *per* Lord Kenyon, C. J., in R. *v.* Sargent, 5 T. R. 467; R. *v.* Parry, 6 A. & E. 810.

(*h*) See R. *v.* Mayor of Colchester, 2 T. R. 259; R. *v.* Mayor of York, 4 T. R. 699; R. *v.* Bankes, 3 Burr. 1454; R. *v.* Mayor of Oxford, 6 A. & E. 349; Frost *v.* Mayor of Chester, 5 E. & B. 531; R. *v.* Mayor of Winchester, 7 A. & E. 215; R. *v.* Mayor of Leeds, 11 A. & E. 512; R. *v.* Ricketts, 3 N. & P. 151.

(*i*) 5 E. & B. 539; 25 L. J. Q. B. 61.

The distinction will be further exemplified when dealing with "Mandamus," *post.*

What are public offices within the above rule.

The following have been held to be public offices within the general rule stated at the beginning of this chapter: that of judge of county courts (*k*); that of mayor, or alderman (*l*); that of justice of the peace of a borough (*m*), or of a liberty, lordship, or manor (*n*); recorder (*o*); coroner, whether of a borough or couny (*p*); sheriff of a borough (*q*); bailiff of a borough, although not a corporate office (*r*), or bailiff of a borough and manor, being as such prescriptive officer of the court leet (*s*), or bailiff of a ville (*t*); town councillor (*u*); portreeve of a borough and manor, who, as such, was returning officer of the borough (*x*); bridge master of a borough (*y*); master and councillor, commonalty stewards, or assistant of a borough (*z*); constable of a borough (*a*), township (*b*), or parish (*c*); chief constable of hundred (*d*), or wapentake (*e*); governor, and also bailiff of the Com- [★ 124] pany of Conservators of the ★ Great Level of the Fens (*f*); bailiff of a court leet (*g*); steward of

(*k*) R. *v.* Parham, 13 Q. B. 858.

(*l*) R. *v.* McGowan, 11 A. & E. 869; Lloyd *v.* The Queen, 31 L. J. Q. B. 209; R. *v.* Bradley, 3 E. & E. 634; R. *v.* Dixon, 15 Q. B. 33; R. *v.* Harvey, 3 Q. B. 475.

(*m*) R. *v.* Patteson, 4 B. & Ad. 9; R. *v.* ———, 2 Camp. 363.

(*n*) R. *v.* Mashiter, 6 A. & El. 153.

(*o*) Tucker *v.* R. 2 Bro. Parly. Cas. 304 (turning on a point of ancient pleading); R. *v.* Mayor of Colchester, 2 T. R. 259; R. *v.* Sundys, 2 Barnard. 301; R. *v.* Marshall, 2 Chitt. 370.

(*p*) R. *v.* Grimshaw, 10 Q. B. 747; R. *v.* Taylor, 11 A. & E. 949; R. *v.* Sayer, 5 T. R. 376, note; R. *v.* Diplock, 10 B. & S. 174; L. R. 4 Q. B. 549.

(*q*) R. *v.* Whitwell, 5 T. R. 85.

(*r*) R. *v.* Highmore, 5 B. & Ald. 771; R. *v.* Sargent, 5 T. R. 466; R. *v.* McKay, 4 B. & C. 351; R. *v.* Duke of Richmond, 6 T. R. 560.

(*s*) R. *v.* Bingham, 2 East, 308.

(*t*) R. *v.* Boyles, 2 Str. 836; 2 Lord Raym. 1559; R. *v.* Thompson, 5 T. R. 376, note.

(*u*) See for modern examples, R. *v.* Ireland, L. R. 3 Q. B. 130; R. *v.* Oldham, 10 B. & S. 193; R. *v.* Owens, 2 E. & E. 86; R. *v.* Tart, 1 E. & E. 618; R. *v.* Francis, 18 Q. B. 526; R. *v.* Hammond, 17 Q. B. 772; R. *v.* Coward, 16 Q. B. 819.

(*x*) R. *v.* Mein, 3 T. R. 596; see also R. *v.* Richards, 9 East, 469.

(*y*) R. *v.* Downes, 1 T. R. 453.

(*z*) 2 Gude, 278; 6 Went. 81; 2 Gude, 255.

(*a*) R. *v.* Wallis, 5 T. R. 375, 376, note.

(*b*) R. *v.* Lane, 5 B. & A. 488; R. *v.* Booth, 12 Q. B. 884.

(*c*) R. *v.* Goudge, 2 Str. 1213.

(*d*) R. *v.* Ragsdale and Baynes, 5 T. R, 376, note.

(*e*) R. *v.* Watkinson, 10 A. & E. 288.

(*f*) R. *v.* Bedford and Others, 1 Barnard. 242.

(*g*) R. *v.* Bingham, 2 East, 308.

a court leet (*h*); chief clerk or deputy clerk of a court leet (*i*); registrar and clerk of a court of requests (*k*); clerk of a county court (*l*); high bailiff of a county court (*m*); gaoler or governor of a borough gaol (*n*); freeman (*o*), or burgess (*p*), or free burgess (*q*), or capital burgess (*r*), or person claiming to vote by virtue of a burgage tenement (*s*); member of a local government board (*t*); a commissioner under a local improvement Act (*u*); conservator of a fishery district (*x*); member of a school board (*y*); member of the General Council of Medical Education under 21 & 22 Vict. c. 90 (*z*); clerk of the peace (*a*); clerk to the board of guardians of a union (*b*) and superintendent registrar of a union (*c*); vestry clerk of a parish or township (*d*); master of a city company, as that of Merchant Taylors' Company (*e*), or the Coopers' Company (*f*), or the Patten Makers' Company (*g*); also master of the Company of Tailors at Lichfield (*h*); assistant of the Saddlers' Company (*i*); treasurer of the public money of the

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(*h*) R. *v.* Hulston, 1 Str. 621.
(*i*) R. *v.* Aythrop, 2 Lord Keny. 17.
(*k*) R. *v.* Hall, 1 B. & C. 237.
(*l*) R. *v.* Owen, 15 Q. B. 476; 19 L. J. Q. B. 490; R. *v.* Edye, 12 Q. B. 936.
(*m*) R. *v.* Dyer, 13 Q. B. 851.
(*n*) R. *v.* Lancaster, 10 Q. B. 962.
(*o*) R. *v.* Dawes, 4 Burr. 2022; R. *v.* Pepper, 7 A. & E. 745; R. *v.* Hill, 5 T. R. 376, note.
(*p*) R. *v.* Parkyn, 1 B. & Ad. 690; R. *v.* Warlow, 2 M. & S. 75; R. *v.* Knight, 4 T. R. 419; R. *v.* Hudson, 20 L. J. Q. B. 219.
(*q*) R. *v.* Slythe, 6 B. & C. 240; R. *v.* Bond, 2 T. R. 767; R. *v.* Tate, 4 East, 337.
(*r*) R. *v.* Benney, 2 B. & A. 684; R. *v.* Lawrence, 2 Chitt. 371; R. *v.* Trelawney, 3 Burr. 1615; R. *v.* Bond, 6 D. & R. 333.
(*s*) See Horsham Case in note to 3 T. R. 599.
(*t*) R. *v.* Backhouse, 7 B. & S. 911; 13 W. R. 846; R. *v.* Rippon, 34 L. J. N. S. 444; R. *v.* Ward, L. R. 1 Q. B. 210; R. *v.* Collins, L. R. 1 Q. B. D. 336; 2 Q. B. D. 30; R. *v.* Morgan, L. R. 7 Q. B. 26; R. *v.* Cooban, 56 L. J. M. C. 33.
(*u*) R. *v.* Eddowes, 1 E. & E. 330.
(*x*) Power *v.* Lucas, 11 Ir. Rep. C. L. 44.
(*y*) R. *v.* Turmine, L. R. 4 Q. B. D. 79.
(*z*) R. *v.* Storrar, 2 E. & E. 133.
(*a*) R. *v.* Hayward, 2 B. & S. 585; R. *v.* Russell, 10 B. & S. 91.
(*b*) R. *v.* St. Martin's-in-the-Fields, 17 Q. B. 149; 20 L. J. Q. B. 423; R. *v.* Griffiths, 17 Q. B. 164.
(*c*) R. *v.* Acason, 2 B. & S. 795.
(*d*) R. *v.* Kirby, 1 B. & S. 647.
(*e*) R. *v.* Atwood, 4 B. & Ad. 481.
(*f*) 6 Went. Prec. 63.
(*g*) R. *v.* Bumstead, 2 B. & Ad. 699.
(*h*) R. *v.* Wakelin, 1 B. & Ad. 50.
(*i*) R. *v.* Fisher, 4 B. & S. 575.

[★ 125] ★ county of the city of Dublin (*k*); commissioners for paving the town of Taunton, under an Act of 9 Geo. 3, empowering them to impose rates and taxes on the inhabitants (*l*). In the case of trustees under a private Act for enlarging and regulating the port of Whitehaven, an information was granted on the broad ground that, where any new jurisdiction or a public trust was exercised without authority, informations had constantly been granted (*m*).

Member of Burial Board.—Whether a member of a burial board comes within the rule was incidentally considered in *R.* v. *Overseers of South Weald* (*n*); but it was unnecessary to decide the question.

Poor Law Guardians.—As to poor-law guardians, judicial opinion has fluctuated. In an anonymous case, referred to in *R.* v. *Beedle* (*o*), a *quo warranto* information was granted against a party claiming to act as guardian of the poor in Exeter, under 28 Geo. 3, c. 76. But in the subsequent case of *R.* v. *Ramsden* (*p*) the Court discharged a rule which had been granted against certain governors and directors of the poor of the parish of St. Andrew, Holborn; Littledale and Patteson, JJ., being of the opinion that the information did not lie; Lord Denman entertaining much doubt. The question came again to be considered in *R.* v. *Carpenter* (*q*), when the Court felt bound by its previous decision in *R.* v. *Ramsden*. The same thing happened in the matter of *Aston Union* (*r*). But the authority of these cases was, in the opinion of Patteson, J. (*s*), shaken by the decision of the House of Lords in the case of *Darley* v. *The Queen* (*t*). And more recently, in *R.* v. *Hampton* (*u*), the Court (Cockburn, C.J., Mellor, Lush, and Shee, JJ.) held that a *quo warranto* does now lie for the office of guardian of the poor.

Cockburn, C.J., after referring to *Darley* v. *The Queen*, which must now be taken to be the starting point in considering whether any office is within the scope of a *quo warranto* information, said: "First, the office of guardian of the poor is created by statute, and, [★ 126] ★ seeing that the Crown is an assenting party to every Act of Parliament, it so far emanates from

(*k*) Darley *v.* The Queen, 12 C. & F. 520.
(*l*) R. *v.* Badcock, cited 6 East, 359.
(*m*) R. *v.* Nicholson, 1 Str. 299.
(*n*) 5 B. & S. 407. (*o*) 3 A. & E. 476. (*p*) 3 A. & E. 456.
(*q*) 1 N. & P. 773. (*r*) 6 A. & E. 784.
(*s*) R. *v.* Guardians of St. Martin, 17 Q. B. 161.
(*t*) *Ubi supra.*
(*u*) 6 B. & S. 923. See also R. *v.* Rawlins, L. R. 14 Q. B. D. 325.

the Crown. Secondly, it is an office of a public nature, inasmuch as the management of the poor is a matter of public interest, so far as the large districts created for the purposes of the poor law are concerned. The third question is whether it is an office of a permanent character. That term is applied to an office (*sic*) in contradistinction to one from which a person is removable at pleasure. And in the cases on this point the criterion has always been whether the person was removable at pleasure, whatever the period of the office might be. Was, then, this an office of such a nature that the guardian, during the continuance of the office, though appointed only for a year, is not removable at the pleasure of any one? The board of guardians is a permanent body, and though part goes out of office every year, and is renewed *de anno in annum*, yet, unless in case of gross misbehaviour, there is no power to remove them."

The power given to the Poor Law Board by s. 8 of 5 & 6 Vict. c. 57, to inquire into the validity of the election of a guardian was held not to take away the jurisdiction of the Court, though, as remarked by Mellor, J., in his judgment, if that board was dealing with the question, the Court in the exercise of its discretion might refuse a writ of *quo warranto*.

Other franchises.

Informations have also been granted for holding a court of record within a charter borough, and presiding therein in the absence of the bailiffs, defendant not being one of them (*x*); and for holding a court leet after long disuser, without shewing a title from the original grantor (*y*), the Court thinking, in the latter case, that there was ground for suspecting a defect in title, and that the matter should therefore be tried by a jury; also for setting up a new office (bailiff of a ville) relating to the administration of public justice (*z*): and for claiming to return elisors of a borough or manor (*a*).

In Coke's Entries we find instances of *quo warranto* informations for usurping the franchises of a court leet, borough court, election of bailiffs, holding a market and taking tolls (p. 527), or a fair (p. 544); for claim to waifs, estrays, and the goods of felons ★ (pp. [★ 127] 528, 544, 549); for a claim of correction of others, as to have the assize of bread and beer, weights and measures (*ib.* also p. 551); to have a prison, power of arresting, &c (p. 528), and to punish forestallers, regraters, and

(*x*) R. *v.* Williams, 1 Burr. 402.
(*y*) R. *v.* Bridge, 1 W. Bl. 46.
(*z*) R. *v.* Boyles, 2 Str. 836.
(*a*) R. *v.* Hawkins, 5 T. R. 376, note.

ingrossers (*ib*), a claim of fines and amerciaments, &c. (pp. 551, 561); of a park, warren, &c. (p. 561); a claim of exemption from the government of the mayor, justices, &c., (p. 528).

A *quo warranto* would also lie for a claim to wreck of the sea (*b*).

A rule was granted against a person for claiming an exclusive ferry over the Thames at a particular place; but it was discharged on its being shewn that he only took money of passengers, and set up no exclusive right (*c*).

In an old case (temp. 10 Will. 3) an information was granted against the mayor and aldermen of Hertford to shew by what authority they admitted persons to be freemen of the corporation who did not inhabit in the borough (*d*), a case much commented on without approval in the later case of *R.* v. *Marsden* (*e*), in which Lord Mansfield thus speaks of it: "That case goes upon the supposition that there was no other way to try it, nor to redress the parties concerned. So does the case in Strange, i.e. *R.* v. *Reynell*" (*f*).

Offices not within the general rule.

The cases which have been held not to come within the general rule mentioned at the beginning of this chapter will now be noticed; but in dealing with them we should bear in mind the remark of Tindal, C.J., in *Darley* v. *The Queen* (*g*), that "the cases in which there has been a refusal to allow an information to be filed are not necessarily authorities against the validity of an information when filed, because in the cases of refusal the Courts may have proceeded on the ground that the circumstances were not such as to call for their interference."

Overseers and Churchwardens.—Overseers have been held not to come within the rule (*h*), on the ground [★ 128] that their functions are ★ merely temporary (*i*); also churchwardens (*k*), and the steward of

(*b*) 2 Roll. Abr. 205.

(*c*) R. *v.* Reynell, 2 Str. 1161. Whether an information can in such a case be obtained by a private relator is questioned in R. *v.* Marsden, 3 Burr. 1816.

(*d*) R. *v.* Hertford, 1 Salk. 376.

(*e*) 3 Burr. 1812, 1818.

(*f*) *Ubi supra.* See the cases cited from The Times, *post*, p. 221.

(*g*) 12 C. & F. 538.

(*h*) See *per* Patteson, J., in R. *v.* Carpenter, 1 N. & P. 774; R. *v.* Dawbeny, 2 Str. 1196.

(*i*) *Per* Tindal, C.J., 12 C. & F. 539.

(*k*) R. *v.* Shepherd, 4 T. R. 381; R. *v.* Dawbeny, 2 Str. 1196; R. *v.* Birmingham, 7 A. & E. 254; *Re* Barlow, 30 L. J. Q. B. 271.

a court baron, that being (unlike a court leet) only a private right and no court of record (*l*).

Town Clerk.—In some old cases before the Municipal Corporation Act, 1835, when the right of appointing to the office of town clerk was in a select body, it was held that a *quo warranto* would lie in the case of a town clerk or clerk of the peace of a borough (*m*); but since that statute, s. 102 of which made the clerk removable at the pleasure of the justices (reproduced by s. 159 of the Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50), it has been held that a *quo warranto* will not lie for the office (*n*).

Clerk to a Local Government Board or School Board.—The clerk to a local government board is in a similar position, as every officer or servant of the board is removable at the board's pleasure (*o*). Cockburn, C.J., considered an application for a *quo warranto* in a case of this kind to be an abuse of the process of the Court (*p*).

The same reasoning would appear to apply to the clerk to a school board (*q*).

Sexton.—The question whether a *quo warranto* information would lie in the case of a sexton was incidentally considered in one case (*r*), but it was unnecessary to decide the point. The Court, however, pointed out that there was another mode of trying the right, viz., by withholding his fees, or by paying them and bringing an action against the sexton to recover the amount.

Other Offices.—It has also been held that a *quo warranto* would not lie in the case of the clerk of the Commissioners of Land Tax (*s*); an assistant overseer appointed by the inhabitants in vestry assembled, under 59 Geo. 3, c. 12, s. 7, whose appointment the vestry could revoke by calling another meeting (*t*); a district registrar of births and deaths, the office being held at the pleasure ★ of the Registrar General (*u*); [★ 129] registrar of the Bedford Level Corporation (*v*); com-

(*l*) R. *v.* Hulston, 1 Str. 621.
(*m*) R. *v.* Lloyd, 2 Barn. 310; R. *v.* Davies, 1 M. & R. 538; *Re* Harris, 6 A. & E. 183.
(*n*) R. *v.* Fox, 8 E. & B. 939; see also *Ex parte* Sandys, 4 B. & Ad. 863.
(*o*) *Ex parte* Richards, L. R. 3 Q. B. D. 368; 47 L. J. Q. B. 498.
(*p*) Ib. See also *Ex parte* Richards, 38 L. T. N. S. 684.
(*q*) See Bradley *v.* Sylvester, 25 L. T. N. S. 459.
(*r*) R. *v.* Stoke Damarel, 5 A. & E. 584.
(*s*) R. *v.* Thatcher, 1 D. & Ry. 426.
(*t*) R. *v.* Simpson, 19 W. R. 73.
(*u*) *Ex parte* Parry, Times, 25 May, 1887.
(*v*) R. *v.* Bedford Level, 6 East, 356, 367.

mitteeman of the Licensed Victuallers' Association, a society having a charter from the Crown, but still of a purely eleemosynary character (*x*); a county treasurer, who is the mere servant of the justices in England (*y*); a person who sets up a rabbit warren of a private nature (*z*); and generally all cases of usurpation of franchises of a merely private nature not connected with public government (*a*).

Fair.—The Court will not grant an information for promoting and encouraging the holding of a fair; and it is doubtful whether it will grant one against the person who actually holds the fair (*b*).

Court Leet.—An information has been refused in the case of a person holding a court leet in a manor within a hundred where a court was also held; the Court considering that a private right alone was in question, and one which could be tried in a civil action (*c*).

Private Corporation.—A *quo warranto* information will not be granted in the case of a private corporation.

R. v. *Mousley* (*d*) was the case of a hospital and school supported by funds left by will in 1856, for which a charter was subsequently obtained from the Crown, according to the will of the founder. The Crown, however, by the charter neither added anything to the foundation, nor reserved to itself any control over it. An Act of Parliament was passed in modern times extending the foundation, and making some alterations which by circumstances had become desirable, but neither creating a new corporation, conferring any jurisdiction of a public nature, or enjoining any duty of a like sort. The Court was clearly of opinion that a *quo warranto* was not applicable to such a case, and discharged a rule which had been granted (*e*).

(*x*) *Ex parte* Smith, 8 L. T. N. S. 458.

(*y*) R. *v.* Justices of Herefordshire, 1 Chitt. 700. The distinction between this case and that of the treasurer for the county of the city of Dublin is pointed out by Tindal, C.J., in Darley *v.* The Queen, 12 C. & F. 542.

(*z*) R. *v.* Lowther, 1 Str. 637; Ibbotson's Case, Cases temp. Hardwicke, 261.

(*a*) *Per* Bayley, J., R. *v.* Ogden, 10 B & C. 233.

(*b*) R. *v.* Marsden, 3 Burr. 1812.

(*c*) R. *v.* Cann, Andr. 14.

(*d*) 8 Q. B. 946.

(*e*) The American law in this respect differs from the English. "The propriety of an information in the nature of a *quo warranto* as a remedy for an unlawful usurpation of an office in a merely private corporation, was formerly involved in some doubt, but the question may now be regarded as settled in this country. This species of remedy being generally employed in England in cases of public or municipal corporations, the English precedents

★ The Court dealt similary with an appli- [★ 130] cation to question the election of a committeeman of the Society of Licensed Victuallers, which, though incorporated, is a society of a purely eleemosynary character (*f*).

Fellow of a College.—In *R.* v. *Gregory* (*g*) the case of a fellow of a college (at one of the universities), where there was no visitor, came before the Court. The case has been regarded (*h*) as deciding that a *quo warranto* will not lie; but a careful study of the report does not justify such a conclusion. It was objected, on argument against the rule which had been granted, that the statute of 9 Anne, c. 20, did not give authority to grant informations with regard to college offices, that colleges are for private education only, and that a fellowship could not be called a royal franchise. It was unnecessary to decide the point, as the Court discharged the rule on the merits, being of opinion that the defendant had been duly elected. But, in delivering the judgment of the Court, Lord Mansfield said: "As to this mode by information, the objection to it is ★ strong, that no such information can be [★ 131] filed here under the statute 9 Anne and that all other informations ought to be filed by the Attorney-General; *but those informations did exist before the statute of Anne* (*i*) . . . If a person shew here a grievance, which wants to be remedied, this Court will find a remedy.

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are inapplicable to this particular question, and its solution must be referred to the more general principles underlying the jurisdiction in question. Tested by these principles, an intrusion into an office of a merely private corporation may, in this country, be corrected by information with the same propriety as in cases of public or municipal corporations, since there is in both cases an unfounded claim to exercise a corporate franchise amounting to an usurpation of the privileges granted by the State. Indeed, the intrusion into a corporate office created for the government and exercise of the franchise cannot in principle be distinguished from an usurpation of the franchise itself. And it would seem to be true generally that wherever a charter has been granted, and the right to exercise an office under that charter is questioned, the Court may, in its discretion, permit an information to be filed, as in the case of trustees in a church corporation, or president and directors of an insurance company." (High, § 653). The procedure in America is applied to cases of railway companies, banking companies, river improvement companies, &c. The case of ministers of religious corporations seems an exception (Ib., § 665).

(*f*) *Ex parte* Smith, 8 L. T. N. S. 458.

(*g*) 4 T. R. 240, note. Easter, 12 Geo. 3.

(*h*) It is so treated *arguendo* in R. *v.* St. Catherine's Hall, 4 T. R. 242; and by Cole (on Informations), p. 165.

(*i*) Vide *ante*, pp. 112, 113.

A mandamus, or an action brought by a fellow appointed by the master in right of a lapse, might have answered the same purpose"; language which seems rather to imply that in his opinion the proceeding by *quo warranto* was also open to the parties.

Part of the reasoning, however, on which the opinion of Lord Mansfield was based, viz., that the foundation was not a charity but a corporation, and that the power of superintending did not go to the king as visitor, but devolved on him to be exercised in the King's Bench, was expressly dissented from by the considered judgment of the Court in the subsequent case of *R.* v. *St. Catherine's Hall* (*k*). In this case the Court considered the foundation to be of an eleemosynary character, and that the right of visitation (in the absence of any special visitor) devolved upon the king, to be exercised by him, not in his Court of King's Bench, but by the Court of Chancery acting under the authority of the Great Seal (*l*). And this, it is submitted, is the correct view.

Mere claim without user not sufficient.

A mere claim to an office or other franchise, without actual user, is not sufficient to ground an application for a *quo warranto*. "No instance has been produced," says Buller, J. (*m*), "where the Court have granted an information in nature of *quo warranto* where the party against whom it was applied for has not been in the actual possession of the office."

The fact that the defendant, who had been elected to an office, had tendered himself to be sworn in (the oath not being administered to him), was held not sufficient (*n*).

Neither will the possibility of a new claim being made with success, after a former unsuccessful one, be enough (*o*).

[★ 132] ★ The mere fact of allowing one's name to continue on the burgess list, after notice of objection, is no ground for an information (*p*).

Though a mere claim to be sworn in is not a sufficient user, a swearing in bad in law was held sufficient

(*k*) 2 T. R. 243, 244.

(*l*) "In general, corporate bodies which respect the public police of the country, and the administration of justice, are better regulated under the superintendence of this Court than of the Court of Chancery; but it is otherwise with eleemosynary foundations in general."—*Per* Lord Kenyon, *ib.* 244.

(*m*) R. *v.* Whitewell, 5 T. R. 85.

(*n*) Ib.

(*o*) R. *v.* Pepper, 7 A. & E. 749, *per* Lord Denman.

(*p*) *Re* Armstrong, 25 L. J. B. Q. 238.

where the defendant thought it a good one at the time he took the oath (*q*).

It has been held in a very recent case (*r*) that the making and subscribing a declaration of office as town councillor (under s. 35 of the Municipal Corporations Act, 1882), by a person who had not the majority of votes, did not amount to a *de facto* possession of the office.

If actual user is proved (as, in the case of a town councillor, by shewing his acting as such), it is unnecessary to shew a formal acceptance (*s*).

Wherever there is such a user as to make the office *de facto* full, a *quo warranto* information is the appropriate mode of challenging the title to it, and not a mandamus (*t*).

Where procedure by *quo warranto* is not appropriate.

Exceeding jurisdiction.—The procedure by *quo warranto* is not the mode by which a person exercising an office can be prevented from doing something which the nature of his office does not enable him to do. This must be accomplished in suitable cases by injunction, or in case of judicial offices, by prohibition.

Where one set of justices granted alehouse licenses which another set of justices claimed the exclusive right of granting, the Court refused to the latter justices a rule for a *quo warranto* information against the former, holding that this was not the proper process for trying the right (*u*).

Refusing to undertake office.—Neither is the procedure appropriate in the case of a wrongful refusal to undertake the duties of an office, *e.g.*, that of common councilman (*x*).

Where proceeding is judicial and not ministerial.—If there is any person appointed by law to discharge, at the election to an ★ office, any functions [★ 133] of a judicial character with respect to it, an erroneous decision of such person in that character cannot be questioned by *quo warranto*. It is otherwise as to any acts of a merely ministerial and not of a judicial nature.

In *R.* v. *Andrews* (*y*) the election of defendant as

(*q*) R. *v.* Tate, 4 East, 337.
(*r*) R. *v.* Bangor, L. R. 18 Q. B. D. 349.
(*s*) R. *v.* Quayle, 11 A. & E. 508.
(*t*) R. *v.* Mayor of Oxford, 6 A. & E. 349; R. *v.* Mayor of Winchester, 7 A. & E. 215. See and distinguish R. *v.* Mayor of York, 4 T. R. 699 (where the office was not full *de facto* of either party), and R. *v.* Mayor of Leeds, 11 A. & E. 512.
(*u*) R. *v.* Justices of Durham, 2 L. T. N. S. 372.
(*x*) R. *v.* Hungerford, 11 Mod. 142.
(*y*) L. R. 2 Q. B. D. 30.

member of a school board was held invalid, on the ground that the chairman had by mistake (1) put down votes to one candidate which had really been given to another, and (2) had omitted to reckon some votes altogether. The casting up of the votes being merely ministerial, the chairman's certificate on the subject was held impeachable; but as to a third class of votes, which he held to be valid, though they were really invalid, the Court held his act to be (under 11 & 12 Vict. c. 93, s. 27) judicial, and therefore final, where no appeal was given by statute (*z*).

Where a clerk of the peace was removed from his office by quarter sessions for alleged wilful disobedience, Cockburn, C.J., said: "We cannot go behind the judgment of the quarter sessions and inquire whether the relator was properly removed, the quarter sessions having acted within their jurisdiction, and according to the requirements of justice. Even if there were a failure of any of the essentials of justice, this proceeding (*i.e.* by *quo warranto*) could not be the proper remedy" (*a*).

So also where it was sought to question the validity of votes given at the election of a coroner, a plea setting forth the holding of an election by the sheriff in due form, the declaration of the poll by him, and the proclamation of the defendant duly elected by a majority of votes, was held a complete answer to the information (*b*).

"I entertain no doubt," said Cockburn, C.J., "that the sheriff in holding the county court for the election of coroner, and taking the poll of valid electors and determining which of the candidates is chosen, is exercising functions of a judicial character. He is the [★ 134] ★ judge of the Court; and, under the old system and under the old statutes, part of the business was to take a scrutiny in the course of the election; and when any vote was disputed, very much in the same way as under the old system of election of members of Parliament, it was the practice while the election was going on for the sheriff to inquire into the validity of votes judicially, and a judgment was pronounced in the

(*z*) R. *v.* Cross, 19 L. T. 35, was a decision to a like effect of Lord Campbell at Nisi Prius. See also R. *v.* Collins, 23 W. R. 325.

(*a*) R. *v.* Russell, 10 B. & S. 91, 118. Cockburn, C.J., added: "It may be that on a certiorari to bring up the proceedings of the quarter sessions, advantage might be taken of such a failure: of this, however, I have doubts."—Ib. 118.

(*b*) R. *v.* Diplock, L. R. 4 Q. B. 549.

matter, and the vote admitted or rejected according to the result of the inquiry. We have also the high authority of Lord Coke that the sheriff exercises judicial functions (*c*). I take it to be clear that when a scrutiny of this kind is practically abolished, it could not have been intended that there should be an appeal in a *quo warranto* to this court. . . . I am very far from saying that there may not be cases in which a *quo warranto* information would lie as to the office of coroner: as where the candidate elected was personally disqualified, or where the election might not have been properly conducted. But when the object is simply a scrutiny into the validity of the votes, I think we are precluded by the statement in the plea that the sheriff has duly held the court and proclaimed the defendant elected by a majority" (*d*).

(*c*) 2 Inst. 175.
(*d*) L. R. 4 Q. B. 552, 553.

[★135] ★CHAPTER IV.

GENERAL PRINCIPLES REGULATING THE GRANTING OR REFUSING INFORMATIONS.

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Period of limitation.

At first, it would seem that it was never too late to attack the usurpation of a franchise.

In the time of Lord Mansfield (1767) the Court laid down the rule that, after twenty years of quiet and undisturbed possession of any office or franchise, they would not listen to an application for a *quo warranto* against the occupant (*a*).

Experience showing that this period was too long, the Court in the time of Lord Kenyon (1791), by a general rule, resolved in future to limit their own discretion in granting applications of this nature to six years, beyond which time they would not under any circumstances suffer a party who had been so long in possession of his franchise to be disturbed.

In the following year, 32 Geo. 3, c. 58, s. 1, enacted [★136] that any ★member or officer of any city, borough, or town corporate might plead to any *quo warranto* information, even though filed by His Majesty's Attorney-General, the holding of his office for six years or more before the exhibiting of the information (*b*).

(*a*) R. *v.* Dawes, 4 Burr. 2022, followed in R. *v.* Bond, 2 T. R. 771. "The next thing which the Court took into their consideration was the length of time within which they would grant informations. It was customary never to refuse informations for any length of time; but as the inconvenience and vexation of this were plainly perceived, the Court were desirous to go by a certain rule; and therefore, as the time was indefinite by the common law, and fixed by no statute, they drew a line by analogy to the Statute of Limitations in ejectments: they drew it for twenty years. . . . But when the Court laid down the general rule, they also said that it might be refused *within* twenty years upon other circumstances, &c."—*Per* Lord Mansfield, in R. *v.* Stacey, 1 T. R. 2, 3.

(*b*) See on these last words R. *v.* Brooks, 8 B. & C. 320.

The whole of this Act was repealed by the Municipal Corporations Act, 1882, s. 5 (Sched. I., Part 2), as to all boroughs within the latter Act.

By the last mentioned Act, s. 225 (reproducing 7 Wm. 4 and 1 Vict. c. 78, s. 23), "an application for an information in the nature of a *quo warranto* against any person claiming to hold a corporate office, shall not be made after the expiration of twelve months from the time when he became disqualified after election"; and, by the interpretation clause, "corporate office" means the office of mayor, alderman, councillor, elective auditor or revising assessor (*c*): and s. 73 enacts that every municipal election (that is, by s. 7, every election to a corporate office) not called in question within twelve months after the election, shall be deemed to have been to all intents a good and valid election.

The effect of these provisions is not to make sufficient an application at any time within the twelve months, but only to provide that no application shall be made after the expiration of that period. The Court in its discretion will refuse an application within the twelve months, if delayed too long.

Except in the case of a corporate office, the limit of six years laid down by the rule of Court in Lord Kenyon's time is that which the Court adopts. And it has been held, in cases where six years is the period of limitation, that it is not sufficient that the order *nisi* for an information has been granted within the six years; it is also necessary that the information should be filed within that period (*d*). Lord Denman alluded to a case of this kind where, under peculiar ★ cir- [★ 137] cumstances, leave was given conditionally to exhibit the information on the day the rule *nisi* was granted (*e*).

Where a person was elected alderman in 1868, being then duly qualified, ceased to occupy any house, etc., in 1873, and was in consequence struck off the new burgess list in that year, but continued to act as alderman, an application for a *quo warranto* made within

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(*c*) Sect. 7: The corresponding clause in the repealed enactment (7 Wm. 4 and 1 Vict. c. 78) had the words "mayor, alderman, councillor, *or burgess*." It was questioned in R. *v.* Pepper, 7 A. & E. 745, whether "freemen" came within this enactment; but it was unnecessary to decide the point.

(*d*) R. *v.* Harris, 11 A. & E. 518, 8 Dowl. 499. This case was put in argument wholly on the statute of 32 Geo. 3, c. 58; but it is questionable whether that statute was applicable to any office other than municipal. See also R. *v.* Stokes, 2 M. & S. 71, and R. *v.* Brooks, 8 B. & C. 320, cases decided under the same statute.

(*e*) 11 A. & E. 519.

twelve months of his being struck off the burgess roll, but more than twelve months after he had ceased to occupy, was held to be too late (*f*).

Where the disqualification consists in being interested in a contract with the town council, so long as the contract continues, the disqualification caused by it arises *de die in diem;* and, though no application for a *quo warranto* can be made after the lapse of twelve months from the cessation of the contract, an application can be made at any time during its continuance (*g*).

It may be laid down as a general rule that, as to all annual offices on which no title to any other depends, the Court in the exercise of its discretion will refuse a rule where the matter cannot be determined before the year of office expires (*h*).

Where the defendant was put on the burgess roll which came into operation on the 1st of November, 1866, not being at the time duly qualified to be on it, and was elected town councillor in August, 1867, an application on the 18th of November, 1867, for a *quo warranto* on the ground that he was disqualified at the time of election, not being then entitled to be on the burgess list, was refused; partly, it would seem, on the ground of delay, and partly because it was an attempt to question his title to be on the burgess list through this collateral proceeding (*i*).

[★138] ★ Where a burgess had voted at an election of town councillors, not being at the time properly qualified by residence, but no steps were taken against him until within two days of his becoming qualified, the rule *nisi* was discharged with costs (*j*).

Derivative titles.

Many attacks on the holders of offices were, in former days, grounded on the invalidity of the title of the

(*f*) *Ex parte* Birkbeck, L. R. 9 Q. B. 256; Blackburn, J., pointed out that the party still ran the risk of penalties if he acted while disqualified.

(*g*) R. *v.* Francis, 18 Q. B. 526; 21 L. J. Q. B. 304. As to the lateness of the application in this case, Lord Campbell said that if the relator had been a member of the council at the time the contract was entered into, that might have been a ground for refusing a *quo warranto;* but he was not; and his mere knowledge of the existence of the contract at that time was not a ground for holding that he could not appear as a relator.

(*h*) R. *v.* Hodson, 4 Q. B. 648, n.; in which case the motion was on the 26th of January for exercising, on the previous 6th of November, the office of burgess of Lichfield. Cause was shewn in Trinity Term, and the considered judgment of the Court discharging the rule on the ground of delay, was delivered on the 9th June.

(*i*) *Ex parte* Hindmarch, L. R. 3 Q. B. 12.

(*j*) *Re* Dunn, 10 Jur. 1095.

persons who presided at the election, or who performed some ministerial act in giving admission to the offices (*k*).

A partial remedy was supplied by 32 Geo. 3, c. 58, s. 3 (*l*), which enacted that the title under any election, nomination, swearing into office or admission, should not be questioned on account of any defect in the title of the person or persons electing, nominating, swearing into office or admitting, provided these latter had been *de facto* in exercise of their offices six years previous to the filing of the information.

As to all corporate offices a more complete remedy was provided by 7 Will. 4 and 1 Vict. c. 78 (*m*) reproduced in sect. 42 of the Municipal Corporations Act, 1882, which enacts that "the acts and proceedings of a person in possession of a corporate office and acting therein, shall, notwithstanding his disqualification or want of qualification, be as valid and effectual as if he had been qualified. An election of a person to a corporate office shall not be liable to be questioned by reason of a defect in the title of the person before whom the election was had, if that person was then in actual possession of or acting in the office giving the right to preside at the election."

It was held in *R.* v. *Stokes* (*n*) that 32 Geo. 3, c. 5, s. 3, did not apply where the defect was in the title of the party himself to a former office, which formed in part his qualification to that in question. At least, the point was held so doubtful that, although the defendant had exercised the office of town councillor for more than six years, the Court made absolute a rule for a *quo warranto* information against him for exercising the office of mayor, on account of a defect of title to the former office. But, as observed by Lord Denham in ★ a later case (*o*), no further proceedings [★ 139] in the case are reported, nor could it be found, upon inquiry, that the point ever came for final decision before the Court upon the record.

A similar point came before the Court in the subsequent case of *R.* v. *Preece* (*p*), where the validity of the defendant's election as mayor was challenged on the ground that he had not been well elected alderman,

(*k*) See R. *v.* Stacey, 1 T. R. 1; R. *v.* Spearing, 1 T. R. 4, n.

(*l*) This statute is repealed only as to boroughs within the Municipal Corporations Act, 1882. (45 & 46 Vict. c. 50, s. 5.)

(*m*) Repealed by the Municipal Corporations Act, 1882, s. 5.

(*n*) 2 M. & S. 71.

(*o*) R. *v.* Preece, 5 Q. B. 98; 12 L. J. Q. B. 335.

(*p*) *Ubi supra.*

and that he had been elected mayor as such alderman; the application for a *quo warranto* being made at a time when, by statute, his right to the aldermanic office could not have been questioned. In discharging the rule which had been granted, Lord Denman said: "It seems to us highly objectionable that the title, which has not been questioned and cannot be questioned, to the inferior office should be impeached at a subsequent period, when the title to a higher office has been built upon it; and that there is an absurdity in ousting a mayor because he was not a good alderman, who upon his ouster must immediately be remitted to his office of alderman, and cannot be disturbed in it" (*q*).

The same principle was acted on in *Ex parte Hindmarch* (*r*), where, no steps having been taken to remove a man from the burgess list, his right to be elected councillor was attacked on the ground that at the time of election he was not entitled to be on the burgess list (*s*).

It is now provided by sect. 73 of the Municipal Corporations Act, 1882, that "every municipal election not called in question within twelve months after the election, either by election petition or by information in the nature of a *quo warranto*, shall be deemed to have been to all intents a good and valid election."

Grounds for moving.

It is obvious that the grounds on which a person's title to an office is liable to an attack may be of very various kinds.

[★ 140] ★ The following have been most usual:—

(1.) *Disqualification at time of Election.*—That at the time of his election he was personally disqualified (*t*).

(*q*) Additional reasons for the judgment in this case were thus stated by Lord Denman: "No inconvenience can result to others from the present mayor retaining his office, as the stat. 7 Wm. 4 and 1 Vict. c. 78, s. 1, makes him a good presiding officer at all corporate meetings for election of others at which the mayor ought to preside. Nor could any benefit result from the rule being made absolute, as no judgment of ouster could, with the utmost diligence, be obtained against him till within a very few days of the expiration of his year of office." (5 Q. B. 98, 99.) See also R. *v.* Peacock, 4 T. R. 684.

(*r*) L. R. 3 Q. B. 12.

(*s*) See *per* Cockburn, C.J., p. 14.

(*t*) See R. *v.* McGowan, 11 A. & E. 869 (the case of a person elected mayor who was alleged not to have been at the time a lawful alderman or councillor). R. *v.* Harvey, 20 L. J. Q. B. 232; R. *v.* York, 2 Gale & D. 105 (the case of a person elected councillor who had an interest in a contract with the town council). R. *v.* Francis, 18 Q. B. 526; also the case of a town councillor interested in a contract, it being immaterial whether the contract was one binding on the council or not. See also R. *v.* Franklin, 6 Ir. Rep. C. L. 239. R. *v.* Hiorns, 7 A. & E. 960 (a person elected councillor who was ineligible as holding the office of as-

A person is not disqualified by reason of his holding an office incompatible with that to which he is elected, as his acceptance of the latter office vacates the former (*u*).

(2.) *No Majority of Votes.*—That the defendant had not a majority of legal votes (*x*).

It is now provided by sect. 87 of the Municipal Corporations Act, 1882 (reproducing s. 12 of 35 & 36 Vict. c. 12), that no "municipal election" shall be questioned on either of the two preceding grounds except by an election petition.

As "municipal election" is defined (sec. 7) to mean "election to a corporate office," and "corporate office" is defined to mean that of ★ "mayor, alder- [★ 141] man, councillor, elective auditor or revising assessor," it follows that no election to any of these offices can now be questioned by *quo warranto* on either of these grounds.

The section does not apply to any disqualification arising after election.

The effect of 47 & 48 Vict. c. 70, s. 36, is to make the foregoing observations true also of elections of (A) members of local boards, (B) improvement commissioners, (C) guardians, and (D) members of school boards.

(3.) *Invalidity of Election.*—That the election itself was invalid by reason of some irregularity in the manner in which it was conducted (*y*).

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sessor). R. *v.* Corporation of Pembroke, 8 Dowl. 302 (decided under an enactment now repealed). R. *v.* Sargent (5 T. R. 466). R. *v.* Orde, 8 A. & E. 420, n., and R. *v.* Duke of Richmond, 6 T. R. 560 (where the objection was insufficient legal residence within the borough). *Ex parte* Hindmarch, L. R. 3 Q. B. 12 (elected councillor, not being at the time qualified to be on the burgess list). As to the effect of bankruptcy, see R. *v.* Mayor of Leeds, 7 A & E. 963; R. *v.* Ricketts, 3 N. & P. 151; R. *v.* Chitty, 5 A. & E. 609; R. *v.* Rowley, 20 L. J. Q. B. 198; R. *v.* Dudley, 11 A. & E. 875; R. *v.* Stanley, *ib.* 882; R. *v.* Alderson, 1 Q. B. 878. See R. *v.* Cooban, 56 L. J. M. C. 33, as to disqualification of a member of a local board of health under Rule 5 of Sched. II. of the Public Health Act, 1875 (38 & 39 Vict. c. 55).

(*u*) See R. *v.* Bangor, L. R. 18 Q. B. D. 347, 361, distinguishing R. *v.* Coaks, 3 E. & B. 249.

(*x*) As to the effect of notice of a candidate's disqualification on the validity of votes subsequently given for him, see R. *v.* Hiorns, 7 A. & E. 960; R. *v.* Hawkins, 10 East. 211; 2 Dow. 124; R. *v.* Parry, 14 East, 549; R. *v.* Bridge, 1 M. & S. 76; *Re* Bester, 7 Jur. N. S. 262. As to the powers of the returning officer at an election under the Public Health Act, 1875 (38 & 39 Vict. c. 55), see Rules 51–55, in Sched. II. to that Act, and R. *v.* Cooban, 56 L. J. M. C. 33. Distinguish the powers of the returning officer under the Ballot Act, 1872, and the Municipal Corporations Act, 1882, as to which see R. *v.* Bangor, L. R. 18 Q. B. D. 349.

(*y*) See R. *v.* McGowan (11 A. & E. 869), where an alderman was elected before the mayor was. See also on this point R. *v.* Dudley, 11 A. & E. 875, and R. *v.* Parkyns, 3 B. & A. 668, and

(4.) *Improper admission to office.*—That the defendant was not properly admitted to the office (*z*).

[★ 142] ★ Sect. 35 of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), enacts that a person elected to a corporate office (*i. e.*, that of mayor, alderman, councillor, elective auditor, or revising assessor, shall not, until he has made and subscribed before two members of the council, or the town clerk, a declaration as in the 8th schedule to the Act set forth, act in the office except in administering that declaration.

Though the mayor as such is not now obliged to take an oath, yet as by virtue of his office he is to be a justice for the borough (Municipal Corporations Act, 1882, s. 155), he must in the latter capacity take the oaths required by 31 & 32 Vict. c. 72, s. 6 (*a*).

As already stated, the legality of admission is not dependent on the validity of the title of the person admitting (*b*).

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sect. 60 of the Municipal Corporations Act, 1882; R. *v.* Maddy and R. *v.* Stanley (11 A. & E. 869, 882) as to the eligibility of an outgoing alderman for the office of mayor (now expressly made eligible by sect. 15 of the Municipal Corporations Act, 1882); R. *v.* Parkinson (L. R. 3 Q. B. 11), where a person was nominated town councillor for a particular ward by a person not entitled to vote for that ward; R. *v.* Mayor of Winchester (7 A. & E. 215), where proper notice of an extraordinary vacancy had not been given and the voting papers were also irregular. See also on this subject R. *v.* Mayor of Leeds, 7 A. & E. 963, and R. *v.* Rowley, 20 L. J. Q. B. 198. R. *v.* Monday (Cowp. 530), R. *v.* Player (2 B. & A. 707); as to election by lists R. *v.* Smith, 2 M. & S. 583 (decided on the pleadings); R. *v.* Buller (8 East, 389) and R. *v.* Williams (2 M. & S. 141), as to improper absence of the presiding officer. On this point see also R. *v.* Backhouse, L. R. 2 Q. B. 16. R. *v.* Rippon and others, L. R. 1 Q. B. D. 217, where the election of the defendants to fill four vacancies, three being regular vacancies and one a casual one caused by resignation, was held invalid, because neither in the notice of election nor in the voting papers delivered to the electors was any distinction made between the regular vacancies and the casual one. Objections to the validity of an election on the ground of the presiding officer not being legally qualified (such as in R. *v.* Corporation of Bridgwater, 3 Doug. 379; R. *v.* Smith, 5 M. & S. 271) were done away with by sect. 53 of 5 & 6 Will. 4, c. 76, an enactment reproduced by sect. 42 of the Municipal Corporations Act, 1882.

(*z*) *E. g.*, that as mayor, &c., he had acted without being sworn in (when this was necessary). Mayor of Penryn's Case, 1 Str. 582; 2 Bro. P. C. 294; R. *v.* Clarke, 2 East, 75; R. *v.* Courtenay, 9 East, 246, 267; R. *v.* Parry, 14 East, 549; R. *v.* Swyer, 10 B. & C. 486, where the Court said that a person first became mayor when he was sworn in, not when he was elected. With the abolition of oaths the Indemnity Acts have ceased, and the cases decided on them are no longer of importance.

(*a*) As to the manner of taking them, see 34 & 35 Vict. c. 48, s. 2.

(*b*) R. *v.* Slythe, 6 B. & C. 240. See 45 & 46 Vict. c. 53, s. 42, and *ante*, p. 138.

(5.) *Subsequent disqualification.*—That after a valid election and admission the defendant subsequently became disqualified: as, in case of a mayor, alderman, or councillor, by bankruptcy or compounding by deed with his creditors; or (except in case of illness) being continuously absent from the borough, being mayor, for more than two months, or being alderman or councillor, for more than six months; in which case the council shall forthwith declare the office to be vacant, and signify the same by notice signed by three members of the council, and countersigned by the town clerk, and fixed on the town hall, whereupon the office shall become vacant (*c*).

Until the council shall have pursued the course pointed out there is no vacancy, and, the office being full, there cannot be a new election without a *quo warranto* information to determine the title. But when the council has done so, the vacancy is fully established just as it would be by judgment of ouster on *quo warranto* (*d*).

A somewhat similar procedure is to be adopted, and with like effect, in the case of resignation of any corporate office (*e*).

★ Acceptance of an incompatible office will [★ 143] work a disqualification, if the holder can resign his former office without the consent of any other person, or has obtained that consent where requisite; but, though a ground of amotion from a corporate office, it does not *ipso facto* vacate the office, unless the second office is also a corporate one (*f*).

The following have been held incompatible offices: alderman and town clerk, the appointment of an alderman to the office of town clerk being equivalent to an amotion from the former office (*g*); councillor and clerk of the Court of Requests of a borough under a local Act and sect 72 of the Municipal Corporations Act, 1835 (*h*); jurat and town clerk (*i*); alderman and justice of a city and treasurer of the county of the same

(*c*) Municipal Corporations Act, 1882 (44 & 45 Vict. c. 50), s. 39. See also sect. 32 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52).

(*d*) R. *v.* Phippen, 7 A. & E. 966; 3 N. & P. 151; R. *v.* Leeds, 7 A. & E. 963. See also Hardwick *v.* Brown, L. R. 8 C. P. 406, and R. *v.* Welchpool, 35 L. T. N. S. 594.

(*e*) See sect. 36 of the Municipal Corporations Act, 1882.

(*f*) R. *v.* Patteson, 4 B. & Ad. 9.

(*g*) R. *v.* Pateman, 2 T. R. 777; R. *v.* Tizzard, 9 B. & C. 418. See the observations on this case, *infra*, p. 145.

(*h*) Staniland *v.* Hopkins, 9 M. & W. 178.

(*i*) Milward *v.* Thatcher, 2 T. R. 81.

city, the treasurer being appointed by the justices in quarter sessions (*k*) ; alderman and capital burgess (*l*); alderman and town councillor (*m*).

The office of capital burgess was held not incompatible with that of stewart of the corporation (*n*).

The offices of clerk of the peace and town clerk were formerly held not incompatible with that of councillor (*o*) ; but by sect. 17 of the Municipal Corporations Act, 1882 (re-enacting a provision of the Act of 1835), the town clerk must not be a member of the council.

See other disqualifications for acting in, as well as for being elected to, municipal office, enumerated in sect. 12 of 45 & 46 Vict. c. 50.

The acceptance of an office incompatible with one already held, even though the acceptance be under a void election, was held to operate as a surrender of the office previously held (*p*). But in a later case an invalid appointment to an incompatible office, and an acting in such office, were held not to vacate the office previously held (*q*).

When previous amotion is requisite.

[★ 144] ★ In the last-mentioned class of cases, and in all others where a disqualification supervenes after election and admission to a corporate office, amotion by the corporation is a condition precedent to obtaining a *quo warranto* information ; except where, as above-mentioned, the acceptance of an incompatible office amounts to an amotion, and in the cases which come within sects. 36 and 39 of the Municipal Corporations Act, 1882.

This was so held in a case (*r*), where by the terms of the charter every alderman removing from the borough "*thereby vacated his office.*" Notwithstanding these words Lord Kenyon held that non-residence did not *ipso facto* vacate the office, pointing out the analogy of the Statute of Westminster 2, which declared that fines levied contrary to it should be *ipso jure* null ; and yet it had been repeatedly determined that they were only voidable and must be reversed by writ of error. And

(*k*) R. *v.* Patteson, *ubi supra.*
(*l*) R. *v.* Hughes, 5 B. & C. 886.
(*m*) R. *v.* Bangor, L. R. 18 Q. B. D. 349.
(*n*) R. *v.* Trelawney, 3 Burr. 1615.
(*o*) R. *v.* Jones, 1 B. & Ad. 677.
(*p*) See R. *v.* Hughes, 5 B. & C. 886.
(*q*) R. *v.* Day, 9 B. & C. 702; the previous case of R. *v.* Hughes not being referred to.
(*r*) R. *v.* Heaven, 2 T. R. 772, following Vaughan *v.* Lewis, Carth. 227, where, however, the terms of the charter were "*non diutius remanebit in officio*, &c." which are very different from those above stated. See also R. *v.* Ponsonby, Say. 245.

Ashurst, J., laid down the broad proposition that "wherever a person has been once duly elected into a corporate office, and forfeits it by misconduct, his amotion by the corporation is a previous and necessary step to be taken before this Court will grant an information in nature of a *quo warranto* against him."

The general rule on the subject is to be found in the considered judgment of the Court in *R.* v. *Patteson* (*s*) delivered by Parke, J. He first points out that it would be an anomaly in the law if a public officer who could not directly resign, or be amoved without the concurrence or privity of a superior authority, should be able to accomplish the same object indirectly by an acceptance of an incompatible office: a sheriff for instance, who is indictable for not accepting and exercising his office, might relieve himself without the concurrence of the Crown, by being elected to the office of coroner; and other instances of the same kind might be put. The judgment then proceeds: "These considerations led us to doubt whether the general proposition can be supported, that under all circumstances the acceptance of an incompatible office, by whomsoever the appointment to it is made, absolutely avoids a former ★ office; and upon reference to the authori- [★ 145] ties, we think that this proposition is not made out, but that it must be limited and qualified; and that such acceptance (though it may be ground of amotion) does not operate as an *absolute avoidance* in those cases where a person cannot divest himself of an office by his own mere act, but requires the concurrence of another authority to his resignation or amotion, unless that authority is privy and consenting to the second appointment."

With reference to *R.* v. *Tizzard* (*t*), the judgment points out that it does not appear by the pleadings in that case whether the mayor, alderman and bailiff, who appointed to the office of town clerk, had or had not the power of accepting the resignation of that of alderman, "and as this objection was not stated, we do not consider the case as forming an exception to the position now laid down."

As already observed, sect. 87 of the Municipal Corporations Act, 1882 (44 & 45 Vict. c. 50), does not apply to a disqualification of a town councillor arising after election.

The non-user or long neglect of a franchise, as well Non user or

(*s*) 4 B. & Ad. 9.
(*t*) 9 B. & C. 418, *supra*, p. 143.

misuser of a franchise.

as the misuser or abuse of it, may also work a disqualification for the further possession of it.

However long the neglect or great the abuse of a franchise, it cannot be treated as having ceased to exist until the grant is repealed by *scire facias* or *quo warranto*. "The proceeding by *quo warranto* supposes the party in actual though not in legal possession, and therefore judgment of ouster is necessary to dispossess him" (*u*).

Where, according to former charters, there had been a local government in a borough which was allowed to be lost through neglect, the rights of the surviving burgesses were considered, for certain purposes, still to remain; but, "for the misconduct of the corporation," said Bailey, J., "in not keeping up the governing body, I am of opinion that it might have been dissolved by *quo warranto*" (*x*).

In the time of Lord Holt, the Court granted an information against the mayor and common council of a borough to know by what warrant they admitted foreigners [★ 146] and strangers to the freedom ★ of the town; because the injured freemen of the town could have no other way to remedy themselves or to try their right (*z*).

An information, in a case of this kind, must, as already stated (*ante*. pp. 117, 118) be filed by the Attorney-General.

Information against a defendant after he has ceased to hold office.

As a general rule the Court will not grant an information to question the defendant's title to an office after he has actually ceased to hold it.

But there are some exceptions :—

First, where the office has been resigned after order *nisi* granted; for, as observed by Lord Ellenborough (*a*), a resignation is no answer, though it may regulate the discretion of the Court in imposing the fine.

Again, where the object is to try a civil right; for, as observed in one case (of an information against an alderman four years after his office had expired), "in order to invalidate the election of other members (chosen whilst he was in office), it may be put in issue that he was not a legal officer; and to prove that, it may be necessary to produce the record of his conviction, as the judge may otherwise say, he appears to have been an officer *de facto*, and the right to his office is not the issue then to be tried" (*b*).

(*u*) *Per* Bayley, J., Peter *v.* Kendal, 6 B. & C. 710.
(*x*) R. *v.* Hughes, 7 B. & C. 720. (*z*) *Anon.*, 12 Mod. 225.
(*a*) R. *v.* Warlow, 2 M. & S. 75; see also R. *v.* Morton, 4 Q. B. 146; and R. *v.* Sidney, 2 L. M. & P. 149.
(*b*) R. *v.* New Radnor, 2 Ld. Keny. 498. Foster, J., who was

Another exception is where the relator's object is to substitute another candidate at once in the office.

Thus where there were five candidates for four vacancies at an election of town councillors, and one of the successful candidates, as returning officer and mayor, was disqualified, the candidate last on the poll who claimed to have been elected was granted an information against the mayor, though the mayor had resigned his office as councillor immediately after the election, on being convinced of his disqualification. "Here," said Cockburn, C.J., "we have something more than a proceeding for the mere purpose of ousting the party from the office which he has been holding. If ★ the purpose of these proceedings were [★ 147] merely to vacate the office so that a fresh election might take place, it is obvious that the resignation of the office would effect that purpose just as well as the removal of the person from the office by *quo warranto*. In this case, however, the relator not only denies the validity of the defendant's election, but he claims to have been himself elected into the office. . . . A man cannot resign that which he is not entitled to, and which he has no right to occupy. To accept his resignation therefore, on the part of the corporate body, is to assume that he had been properly elected; and to refuse this rule, treating the resignation as sufficient for the purpose of the case, would be to deprive the relator of the advantage which upon the information he would have, either of ousting the defendant if the proceedings are carried to their ultimate results, or of having it admitted on the record by the defendant, not only that he has no present right to the office, but that he never had any. The effect of a resignation would be simply to send the parties to a new election, while the effect of a disclaimer or judgment for the Crown upon the final issue of the *quo warranto* would be to displace the defendant from the first; leaving it open—which otherwise it would not be—to the relator to claim the office to which he says he has been elected and, if he can establish that claim, upon a mandamus to be admitted into the office" (*c*).

There are many cases in which, though the nature

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of a different opinion from that expressed above, said no judgment of ouster could be entered, and it was merely for punishment by fine. But a different view is expressed in the judgment of the Court of Queen's Bench in R. *v.* Blizard, L. R. 2 Q. B. 55; and the case is also referred to with approval In the matter of Harris, 6 A. & E. 477.

(*c*) R. *v.* Blizard, L. R. 2. Q. B. 58; 36 L. J. Q. B. 78; 15 L. T. N. S. 242.

Discretionary refusal.

of the office is such as to make the procedure by *quo warranto* the appropriate method of testing the validity of the title to it, yet the Court in the exercise of its discretion will refuse its assistance. As to such cases no precise rule can be laid down; but, as observed by Lord Mansfield (*d*), all the circumstances taken together must govern the discretion of the Court.

Insignificance of Office.—It will sometimes refuse on the ground of the insignificance of the office. Thus where the right to elect a petty constable was in dispute between the inhabitants of a town and the lord of the manor, the Court said: "No doubt of it, the king has a right to call any one to account, by his writ of *quo warranto*, for exercising any public office, be it [★ 148] ever so small; yet ★ we don't use to grant informations in the nature of them for such inferior offices" (*e*).

Long User.—It has also refused where there had been a long-continued usage in favour of the combination of two offices (that of capital burgess and steward of a manor), which it was alleged could not be held by the same person (*f*).

Where a man had discharged the duties of an office for some years, and made a claim for compensation on his removal, the Court would not grant an information: it would be a hardship on him to be called on to prove his title after he had been turned out of an office in which he had been permitted to act for several years (*g*).

Other remedy.—The Court will also be influenced by the consideration that the question involved may be otherwise tried, as by civil action (*h*).

A combination of the two last-mentioned reasons led the Court to refuse its assistance in *R.* v. *Archdall* (*i*), where the justices of the borough of Cambridge sought an information against the Vice-Chancellor of the University for granting alehouse licences, a franchise which had been exercised by the Vice-Chancellors without question for a very long time. "It has always been the well-established principle of our law," says the judgment of the Court, "to presume everything in favour of long possession; and it is every day's practice to rest

(*d*) R. *v.* Stacey, 1 T. R. 3.
(*e*) Anon., 1 Barnard, 279.
(*f*) R. *v.* Trelawney, 3 Burr. 1615.
(*g*) In the Matter of Harris, 6 A. & E. 475.
(*h*) R. *v.* Cann, And. 14; referred to with approval 2 Burr. 1822. The case seems undistinguishable, on any other ground than that mentioned above, from R. *v.* Bridge, 1 W. Bl. 46.
(*i*) 8 A. & El. 281.

upon this foundation the title to the most valuable properties. We should be departing from this principle and practice if we were now to institute the inquiry prayed for, and call upon the Vice Chancellor to justify the exercise of this ancient franchise. It is possible that it may rest upon no legal foundation, and that upon a full examination it may turn out to be incapable of being supported. By refusing this rule, we do not prevent the parties from raising the question, if they shall be so advised, nor prejudice its determination; we decline only to render any assistance in originating the proceeding which may imply a suspicion in our minds that what has existed unquestioned for centuries is referable only to usurpation on the Crown."

★ It is difficult to gather from the report [★ 149] what was the exact ground of refusal in *R.* v. *Medlicoat* (*k*).

Mere foolish Claim.—The Court has also refused where there was no civil right in controversy, but a mere foolish claim was asserted, such as that set up—after a corporation had been dissolved and there was in fact no corporate body in existence—by an individual to be returning officer at an election of members to serve in parliament, by virtue of his having been elected alderman whilst the corporation existed; a claim in respect of which, said the Court, perhaps a proceeding *in pœnam* by the Attorney-General might be appropriate (*l*).

Conduct or motives of relator.—However clear in point of law the objection may be to the defendant's title, the Court in exercising its discretion will also have regard to, and be influenced by, the conduct, motives or interest of the relator (*m*).

Consequences.—The consequences which may result from granting the information will also influence the exercise of the Court's discretion.

Though the fact that the objection to an individual member of a corporation applies equally to every other member of it is not, in itself and standing alone, a sufficient ground for refusing a *quo warranto* (*n*), it is a reason for requiring a very strong case to be made out (*o*), and one which taken in conjunction with others may have such weight with the Court.

(*k*) 2 Barnard. 221.

(*l*) R. *v.* Saunders, 3 East, 119; see and distinguish Lloyd *v.* The Queen, 31 L. J. Q. B. 209.

(*m*) See *per* Lord Denman, C.J., in R. *v.* Parry, 6 A. & E. 820. *Per* Lord Mansfield, R. *v.* Dawes, 4 Burr. 2123.

(*n*) R. *v.* White, 5 A. & E. 613; R. *v.* Parry, 6 A. & E. 820.

(*o*) "The Court undoubtedly have in some cases permitted

Irregularity producing no serious harm.—Where the validity of a town councillor's election was impeached on the ground that the burgess roll had not been revised in strict accordance with the Act of Parliament (5 & 6 Will. 4, c. 76), the Court was led by a variety of considerations to discharge the rule. "On the one hand," said Lord Denman (*p*), "if the rule be made [★ 150] absolute, the ★ dissolution of the corporation may at least be reasonably apprehended; on the other, it is remarkable that the affidavits in support of the rule impute no corrupt, fraudulent or indirect motive for the acts complained of as irregular, nor do they allege that they have produced injustice, inconvenience, or even any one result different from what would have followed the fullest compliance with the law as they lay it down. They do not go the length of suspecting that a single vote has been won or lost, or that the burgess list would have varied in a single name. It appears moreover that the town clerk had taken the precaution of procuring, and had *bonâ fide* acted upon, the most eminent legal advice." After pointing out that the defective constitution of the Revision Court had been in all respects an immaterial circumstance, Lord Denman added: "If these conditions would, under the old law, have been entitled to weight, they lose none from the passing of the recent statute. On the contrary the difficulties that might attend the reconstruction of corporations once dissolved, and the important functions now vested in the municipal bodies would rather induce increased circumspection in our proceedings. The inferior officers ought indeed to conform with care to the provisions of the law; the wilful departure from them this Court will visit with severity; and even negligence may not always escape animadversion: but our discretion as to the issuing of *quo warranto* informations must be regulated by a regard to all the circumstances which attend the application and all the consequences likely to follow."

This case, followed by two more recent ones (*q*), may be considered as establishing the rule that an

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these informations to be filed where the effect has been thereby to dissolve the corporation; but that has been where strong cases have been made out" (*per* Abbott, C.J., in R. *v.* Trevenen, 2 B. & Ald. 482).

(*p*) R. *v.* Parry, 6 A. & E. 822.

(*q*) R. *v.* Ward, L. R. 8 Q. B. 210; 42 L. J. Q. B. 126; 28 L. J. N. S. 118; R. *v.* Cousins, L. R. 8 Q. B. 216; 42 L. J. Q. B. 124; 28 L. T. N. S. 116.

irregularity not really affecting the result of the election to an office will not, in the absence of bad faith, induce the Court to grant a *quo warranto*.

Blackburn, J., delivering the judgment of the Court in the former of these two cases said: "We think that seeing that the mistake committed here has produced no result whatever; that the same persons have been elected who would have been elected if the election had been conducted with the most scrupulous regularity, and that the defendant's title, if bad at all, is only bad, as I may ★ say, on special demurrer; we [★ 151] ought, in the exercise of our discretion, to refuse leave to disturb the peace of this district by filing this information" (*r*).

The same learned judge in the latter case said: "The rule always acted upon is that if the right person has been elected, and it is not shown that any one else has been kept out, nor the result of the election in any way affected, the Court will not allow the writ to issue" (*s*).

When an information was moved for on the ground of a disputed mode of election, which alone was in controversy at the time of the defendant's election, and which was afterwards answered on shewing cause, the Court would not make the rule absolute to try another incidental and secondary question, as to whether there were a sufficient interval of time allowed between the nomination and election, no person's rights having been set aside by the acceleration, if the election had been really accelerated (*t*).

Delay.—The Court has also frequently refused on the ground of delay in making the application; vide *ante*, pp. 136, 137.

Disqualification of relator.

The Court also refuses an information where the relator has disqualified himself to act as such, or where, there being more relators than one, none of the relators is duly qualified.

Acquiescence.—Acquiescence in the proceeding sought to be invalidated is a disqualification. "It has generally been considered a rule of corporation law," says Abbott, C.J. (*u*), "that a person is not to be permitted to impeach a title conferred by an election in which he has concurred, or the titles of those mediately or immediately derived from that election."

On an application against a mayor, two persons who

(*r*) L. R. 8 Q. B. p. 215.
(*s*) Ib. p. 216.
(*t*) R. *v.* Osbourne, 4 East, 327.
(*u*) R. *v.* Slythe, 6 B. & C. 242.

were present at and concurred in his election were held disqualified to act as relators (*x*). So was another person who voted at the election of mayor the succeeding year, when the mode of election was precisely similar to that at which the defendant was chosen (*y*).

Where the election of a town councillor was questioned on the ground of a defect in the burgess roll, a [★ 152] person who with full ★ knowledge of the objection to the burgess list, had taken part in the election by being himself a candidate and voter, was considered disqualified (*z*). So was a person who, being neither burgess nor inhabitant, took an active part as agent in the same election (*a*).

In cases such as the above ignorance of the law will not get rid of the effect of acquiescence (*b*), though ignorance of the facts may (*c*).

Acquiescence, in order to disqualify, must be acquiescence in the election to the office in question. If that has been opposed, a subsequent acquiescence or acting with the defendant in the office to which he has been elected, even with knowledge of his want of title, will be no disqualification (*d*).

Relators have been allowed to try the right of a defendant to the office of alderman, his election to which they had opposed, though they afterwards made no opposition to his election to the principal office of magistracy, to which his aldermanship was a necessary qualification; and even though they afterwards attended at and concurred in corporate meetings where he presided or where he attended in his official character (*e*). "There must be magistrates," said Lord Kenyon, "and the powers of government cannot stand still till the validity of a former disputed election is ascertained" (*f*).

The principle which governs these cases is the acquiescence of the relator in the objectionable election at the time (*g*).

"The Court have on several occasions said, and said wisely, that they would not listen even to a corporator

(*x*) R. *v.* Symmons, 4 T. R. 223.
(*y*) Ib. See also R. *v.* Slythe (*ubi supra*).
(*z*) R. *v.* Parry, 6 A. & E. 810.
(*a*) Ib. *Sed vide* R. *v.* Rowley, 21 L. J. Q. B. 198.
(*b*) See R. *v.* Trevenen, 2 B. & Ald. 343.
(*c*) R. *v.* Morris, 3 East, 213.
(*d*) R. *v.* Clarke, 1 East, 38. See also R. *v.* Benney, 1 B. & Ad. 684.
(*e*) R. *v.* Clarke, *ubi supra*. (*f*) Ib. 47.
(*g*) *Per curiam*, R. *v.* Trevenen, 2 B. & Ald. 343.

who has acquiesced, or perhaps concurred, in the very act which he afterwards comes to complain of when it suits his purpose" (*h*).

The Court discharged a rule obtained by a relator who had on a previous occasion taken an active part in support of a candidate, to the legality of whose election the same objection was specifically made as the relator now sought to urge, notwithstanding which he ★ then disregarded the objection, saying [★ 153] that he would not avail himself of it till his candidate was safe (*i*).

An unsuccessful candidate at an election of a local board of health obtained a rule for a *quo warranto* information against one of the successful candidates, on the ground that the voting papers having been left in blank (instead of being filled up as required by 11 & 12 Vict. c. 63, s. 24) the election was void. It appearing, on shewing cause, that he himself had voted with a voting paper left in blank, and had also taken part in a former election when a similar course had been pursued, and had been himself so elected, the Court held him disqualified from being a relator (*k*).

Where, however, the defendant's election as town councillor was attacked on the ground of an objection to the form of rating which would vitiate his title to be on the burgess roll, the fact that the relator's attorney, with the privity of the relator, had withdrawn his objection to the defendant's name being on the burgess roll, after the Revision Court had overruled a similar objection to another name which stood on the list before that of the defendant, was held no disqualification of the relator. The case was considered to fall short of previous decisions (*l*).

The mere fact of having formerly taken part in other elections where, though there had been the same irregularity as that now complained of, it was not noticed, has not been considered a disqualification (*m*). And where the defect which vitiated the defendant's title was a latent one (viz., not having taken the sacrament within a year before his election as mayor, as required by 13 Car. 2, st. 2, c. 1), acquiescence in the election was held not to disqualify (*n*).

(*h*) *Per* Lord Kenyon, C.J., R. *v.* Clarke, 1 East, 46.
(*i*) R. *v.* Parkyn, 1 B. & Ad. 690.
(*k*) R. *v.* Lofthouse, L. R. 1 Q. B. 433; 7 B. & S. 447; 35 L. J. Q. B. 141.
(*l*) R. *v.* Huxham, 4 Jur. 1133.
(*m*) R. *v.* Benney, 1 B. & Ad. 684.
(*n*) R. *v.* Smith, 3 T. R. 573.

The legal adviser of the defendant, who had repeatedly advised him that he had been duly elected alderman, was held not to be a proper relator (*o*). The same was held of a town councillor who, in that capacity, administered to the defendant the declaration required by 5 & 6 Will. 4, c. 76, s. 50, with knowledge of the objection to his election (*p*).

[★ 154] ★ It was objected to a relator who sought to question the election of a mayor as being contrary to a bye-law of the corporation, that he was party to an agreement made by the corporation not to enforce that bye-law, and that if the franchise of any person should be impeached in consequence of it, he should be defended at the public expense; and the Court on this ground discharged with costs the rule which he had obtained (*q*).

Where a person had already twice obtained rules *nisi* for informations against the mayor of a borough, which had been discharged on cause shewn, the Court refused to grant him an information against the succeeding mayor on an objection the same as that involved in the former application (*r*).

Similar defect of Title.—Another preliminary objection has always been held fatal in cases to which it applied, viz., that the persons making the application all stand in the same situation as the defendant, and that they have no title to their respective offices, if the objections to the defendant's election were to prevail (*s*); and in such a case the length of time during which the relator has been holding his office will be no answer to the objection that he has been holding it under the same defect which he now seeks to bring home to the defendant (*t*).

Effect of poverty.—A person in low and indigent circumstances, suspected of acting under the influence of or in collusion with some stranger, not before the Court, who is actuated by vindictiveness towards the defendant, is not a proper relator, at any rate in a case where the success of the proceeding would have the effect of dissolving the corporation (*u*).

The Court will not, however, refuse its assistance merely on the ground that the relators are poor and that

(*o*) R. *v.* Payne, 2 Chitt. 369.
(*p*) R. *v.* Greene, 2 Gale & Dav. 24.
(*q*) R. *v.* Mortlock, 3 T. R. 300.
(*r*) R. *v.* Langhorn, 2 N. & M. 618.
(*s*) R. *v.* Cudlipp, 6 T. R. 503; see *per* Lord Kenyon, p. 508.
(*t*) R. *v.* Cowell, 6 D. & Ry. 336.
(*u*) R. *v.* Trevenen, 2 B. & Ald. 339.

the proceedings are instigated, and the funds for them supplied, by a stranger to the corporation (*x*). The Court distinguished such a case from that last referred to, on the ground that there the stranger had threatened that unless the defendant would belong to his political party he would take measures to dissolve the corporation; ★and the corporation would [★ 155] have been dissolved if he had succeeded in displacing the persons against whom proceedings were taken.

"It may indeed be convenient," said Lord Tenterden, "to allow persons not members of the corporation, to lend their assistance in these cases; for if that were not to be permitted, corporations would in many cases go on from year to year, from century to century, acting irregularly and not according to the laws by which they are established, because members themselves will rarely choose to be at the expense of entering into a contest to be sustained between them and their own body generally." In this case, however, the Court required security for costs.

Mere stranger.—A mere stranger to a corporation prowling into other men's rights will not receive assistance from the Court (*y*).

In a case of this kind Lord Mansfield asked: "Why do such persons come for redress? There is no individual among those who apply to the Court at present who says my franchise is hurt. Who are you? What concern have you with the corporation? Only one of the king's subjects: I have no concern. What do you come for? To dissolve the corporation and to disturb its peace. Then what is to be taken advantage of here? A mere blunder, &c." (*z*).

The Court did not, however, consider the fact of the relator being a stranger to the corporation a sufficient objection where the object was to enforce a general Act of Parliament, such as that of 13 Car. 2, St. 2, s. 1 (about receiving the sacrament within twelve months before election (*a*)).

If any one of the relators is duly qualified that is sufficient (*b*). He must, however, not be a person merely put forward as a nominal relator for the purpose of supplying the defects in the qualifications of the real prosecutors (*c*).

(*x*) R. *v.* Wakelin, 1 B. & Ad. 50.
(*y*) R. *v.* Kemp, 1 East, 46, n.
(*z*) R. *v.* Stacey, 1 T. R. 3.
(*a*) R. *v.* Brown, 3 T. R. 574, n.
(*b*) R. *v.* Symmons, 4 T. R. 223; R. *v.* Parry, 6 A. & E. 810.
(*c*) See *per* Lord Kenyon, R. *v.* Cudlipp, 6 T. R. 509.

Primâ facie case not made out.—The Court has also refused to grant an information where the relator has not made out a sufficiently clear *primâ facie* case.

[★ 156] ★Thus where a justice of the peace was elected (under charter) by "the tenants and inhabitants," an application by an unsuccessful candidate for a *quo warranto*, on affidavits alleging that the votes of "inhabitants" not actually householders had been rejected and that a sufficient number of such votes had been tendered on his side to give him a majority, was refused, chiefly on the ground that his affidavits did not shew what class of persons were entitled to vote as "inhabitants not householders" (*d*). The reasons for the decision are most clearly stated in the judgment of Coleridge, J.: "Here it appears that the relator would have had a majority by the reception of persons who were inhabitants but not householders. Then it is contended that the word 'inhabitants' by itself, unless restrained by custom or the context of the grant has, in law, a definite meaning, and that it must here be taken in the full legal sense. If this be so, perhaps a case is made out for granting the rule. But I cannot go along with these propositions. Any lawyer, who was asked the interpretation of the word 'inhabitants' would say, 'I must see where it is used, for by itself it has no definite meaning.' If its signification varies, we must resort to the context for explanation. Then it is contended that according to the context of this grant, the word must mean all persons being in the place *animo morandi*. But in the first place, if that be so, the affidavits ought to have shewn that the applicant had a majority by the votes of persons, not merely passing through, but inhabiting *animo morandi*, in which case the party opposing the rule might have given a direct answer to that allegation; and secondly, I do not think the context of this charter clearly shews that the interpretation suggested is the proper one."

In some cases a rule was enunciated that the Court would not (except where there was no other mode of trying the title of the person elected (*e*)) allow the title of electors to be questioned by attacking the title of the person elected by them (*f*). In case of municipal corporations the fact of being on the burgess roll was considered decisive of the title of an elector (*g*).

(*d*) R. *v.* Mashiter, 6 A. & E. 153. (*e*) R. *v.* Mein, 3 T. R. 596.
(*f*) R. *v.* Latham, 3 Burr. 1487; R. *v.* Hughes, 4 B. & C. 368.
(*g*) R. *v.* Tugwell, L. R. 3 Q. B. 704; Symmers *v.* R., Cowp. 489, 507; *sed vide* R. *v.* Harrald, L. R. 7 Q. B. 361.

Questions of this ★ kind with reference to [★ 157] corporate offices cannot now arise in *quo warranto* informations (*h*).

Who is a duly qualified relator.

He alone is a competent relator who has some interest, other than such as may belong to the community at large, in the question to be tried by the *quo warranto* (*i*), and who has not, by any of the modes already adverted to (*k*), disqualified himself from acting as prosecutor.

Any inhabitant who is subject to the government of town councillors is a competent relator on a *quo warranto* information against one of the councillors: it is not necessary that the relator should be a burgess (*l*).

So any owner of rated property within a borough is a competent relator in a *quo warranto* for exercising the office of town commissioner, the election to which is by the body of the rate payers (*m*).

A person who is disqualified as a relator may make an affidavit in support of the application (*n*).

As already stated, it is not a ground for refusing an information against a member of a corporation that the objection to his title applies equally to every other member of the corporation (*o*).

It has been considered no objection that the proceeding by *quo warranto* is a friendly one, because it may be the only mode whereby a party who is in office can disclaim (*p*).

The Court in the same case permitted certain persons to come in and defend the defendant's title, he being unwilling to do so himself (*q*).

Management of prosecution.

In one case the person who had intended moving for a *quo warranto* information, against several persons for exercising the office of alderman, complained to the Court that he had been improperly displaced by political opponents who had moved for the rules ★ col. [★ 158] lusively with the defendants, making as relator a person in low circumstances and in the employment of the attorney prosecuting the rules, and that the attorney had employed the same agents in London to instruct counsel for and against the rules; and on these grounds

(*h*) *Vide post*, p. 158.
(*i*) See *per* Ashurst, J., R. *v.* Brown, 3 T. R. 574, note (*b*).
(*k*) *Ante*, p. 151–155.
(*l*) R. *v.* Parry, 6 A. & E. 810 ; R. *v.* Quayle, 11 A. &. E. 508 ; R. *v.* Hodge, 2 B. & Ald. 344, n. ; *Cf.* R. *v.* Davies, 1 M. & Ry. 538.
(*m*) R. *v.* Briggs; 11 L. T. N. S. 372.
(*n*) R. *v.* Brame, 4 A. &. E. 664.
(*o*) R. *v.* White, 5 A. & E. 613.
(*p*) R. *v.* Marshall, 2 Chitt. 370.
(*q*) The same thing was done also in R. *v.* Dawes, 4 Burr. 2277.

he asked for the management of the prosecutions. The Court, though of opinion that the facts did not shew collusion or a design on the part of the prosecutors to obtain any undue advantage, on making the rules absolute, directed that the management of the prosecutions should be transferred to the applicant (*r*). Lorn Denman said: "I do not see what unfair advantage can be contemplated by these parties; but it is so important in proceedings of this kind that no suspicion should attach to them, that we think it the safest course to forbid the carrying on of the prosecutions by the original relator, and to make the rules absolute for giving the management of them to the party now applying."

Cases in which election can be questioned only by election petition.

The whole of the 4th part of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), viz., ss. 77–104, being, by 47 & 48 Vict. c. 70, s. 36 (1st Sched.), made applicable to elections for the following offices, viz.: (1) Member of local board, as defined by the Public Health Act, 1875; (2) Member of improvement commissioners, as defined by the Public Health Act, 1875; (3) Guardian elected under the Poor Law Amendment Act, 1834; (4) Member of school board: and as by s. 87 of the Municipal Corporations Act, 1882, a municipal election is only to be questioned by election petition on any of the following grounds, viz.:

(*a.*) that the election was avoided by general bribery, treating, undue influence, or personation; or

(*b.*) that it was avoided by corrupt practices or offences against the fourth part of the Act; or

(*c.*) that the person whose election is questioned was at the time of the election disqualified; or

(*d.*) that he was not duly elected by a majority of lawful votes; it follows that, as to all the above-mentioned offices, a *quo warranto* will not lie to question the election to it on any of the four grounds specified (*s*).

[★ 159] ★ Such a case as *R.* v. *Morgan* (*t*), where the Court made absolute a rule for a *quo warranto* information against the defendant on the application of a person who had a majority of votes over the defendant, but who had been declared not elected on the ground that his nomination was void, whereas it was in reality good, would now be tried on election petition.

(*r*) R. *v.* Alderson, 11 A. & E. 3.

(*s*) See *Re* Armagh Municipal Election Petition, L. R. Ir. 4 C. L., &c., Divisions, 196.

(*t*) L. R. 7 Q. B. 26; and so would R. *v.* Andrews, L. R. 2 Q. B. 30. In the recent case of R. *v.* Cooban (56 L. J. M. C. 33), the procedure by *quo warranto* seems to have been rightly adopted.

★ CHAPTER V. [★ 160]

PROCEDURE TO OBTAIN INFORMATION.

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Application for order *nisi*.

THERE being a duly qualified relator or relators, and the period of limitation not having expired, the first step is to move for an order *nisi* calling on the defendant to shew cause why an information in the nature of a *quo warranto* information should not be exhibited against him to shew by what authority he exercises the particular office or franchise.

Every application for an information in the nature of a *quo warranto* must be by motion to a Divisional Court for an order *nisi*, unless the same be *ex officio* or be made in respect of a corporate office within the meaning of 45 & 46 Vict. c. 50, s. 225 (*a*).

A corporate office within the meaning of this enactment is that of "mayor, alderman, councillor, elective auditor, or revising assessor."

A "burgess" was held not to be a corporate officer, within the meaning of 6 & 7 Vict. c. 89, s. 5 (*b*), and he is clearly not within s. 225 of 45 & 46 Vict. c. 50.

Where notice of motion necessary.

In respect of a corporate office within the last-mentioned statute, the application must be preceded by notice of motion to the person ★ affected [★ 161] thereby, to be served not less than ten days before the day specified in the notice for making the application (*c*).

(*a*) C. O. R. 51.

(*b*) R. *v.* Milner, 5 Q. B. 589, 13 L. J. Q. B. 186.

(*c*) C. O. R. 52. To a like effect is s. 225 of 45 & 46 Vict. c. 50. "In the case of such an application, or of an application for a mandamus to proceed to an election of a corporate officer, the applicant shall give notice in writing of the application to

The notice must set forth the name and description of the applicant, and a statement of the grounds of the application (*d*).

The applicant must deliver with the notice, on service thereof, a copy of the affidavits whereby the application will be supported (*e*).

For form of notice see Appendix.

Time. The time within which an application for a *quo warranto* must be made has already been pointed out *ante*, pp. 136, 137.

Relator. No order for filing any information in the nature of a *quo warranto* is to be granted unless, at the time of moving, an affidavit be produced by which some person shall depose upon oath that such motion is made at his instance as relator; and such person shall be deemed to be the relator in case such order shall be made absolute and shall be named as such relator in such information in case the same shall be filed, unless the Court shall otherwise order (*f*).

As to the competency of a relator, vide *ante*, pp. 151 *seq.*

Affidavits. The affidavits should set forth fully all the material facts of the case; for where the order *nisi* has been discharged on the ground of insufficiency in the affidavits, a renewed application on better materials has not been permitted (*g*).

[★162] ★ Where affidavits were defective only in the title (*h*) or jurat (*i*), the Court permitted a renewed application. But a renewed application would now be

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the person to be affected thereby (in this section called the respondent) at any time not less than ten days before the day in the notice specified for making the application.

"The notice shall set forth the name and description of the applicant, and a statement of the grounds of the application.

"The applicant shall deliver with the notice a copy of the affidavits whereby the application will be supported.

"The respondent may shew cause in the first instance against the application.

"If sufficient cause is not shewn, the Court on proof of due service of the notice, statement and copy of affidavits used in support of the application, may, if it thinks fit, make the rule for the information or mandamus absolute.

"The Court may, if it thinks fit, direct that any issue of fact on an information be tried by jury in London or at Westminster."

(*d*) C. O. R. 53. (*e*) Ib. (*f*) C. O. R. 54.

(*g*) See R. *v.* Barzey, 4 M. & S. 253; *Cf.* R. *v.* Barton, 9 Dowl. 1021; R. *v.* Manchester, &c., Railway Company, 8 A. & E. 413; R. *v.* Smithson, 4 B. & Ad. 51; R. *v.* Harland, 8 Dowl. 323; Saunderson *v.* Westley, *id.* 652.

(*h*) R. *v.* Jones, 8 Dowl. 307.

(*i*) Shaw *v.* Perkin, 1 Dowl. N. S. 306.

unnecessary, as by the New Crown Office Rules (No. 19), the Court or judge may receive any affidavit sworn for the purpose of being used in any cause or matter, notwithstanding any defect by misdescription of parties or otherwise in the title or jurat, or any other irregularity in the form thereof, and may direct a memorandum to be made on the document that it has been so received.

For the general rules as to the framing and swearing of affidavits, vide *ante*, pp. 42–44.

The affidavits, on moving for the order *nisi*, should be entitled merely; "In the High Court of Justice, Queen's Bench Division."

Contents of affidavits.

The affidavits should set forth fully all the material facts, and pledge the deponent's belief to the truth of the various allegations.

Title of affidavits.

It should appear from them, in the first place, that the relator is duly qualified. On an application against a town councillor, an affidavit of "A. B. of C., tailor," was held insufficient, as it did not shew that he was a burgess, or subject to the jurisdiction of the town council (*k*).

But it is no objection to a deponent that he is himself estopped from being a relator (*l*); and the affidavit of such a person may supply the chief ground of the application, there being another competent relator (*m*).

It is sufficient, as before observed, if any one of the relators is duly qualified.

An affidavit of a person that he "has directed an application to be made" for the rule, and that the motion "will be made at the instance of this deponent as relator, and that this deponent shall be deemed to be the relator in case such rule shall be made absolute, and shall be named as such in such information in case the same shall be filed, unless the Court shall otherwise order," was held ★ sufficient under Reg. Gen. M. T. [★ 163] 3 Vict. (*n*). But an affidavit stating that in case the Court should order the information to be exhibited, it was the deponent's intention to be and to become really and *bonâ fide* the relator therein, was held not sufficient (*o*).

See now C. O. R. 54, *ante*, p. 161,

The affidavits must shew that the defendant not only

(*k*) R. *v.* Thirlwind, 33 L. J. Q. B. 171; 9 L. T. N. S. 731.

(*l*) R. *v.* Brame, 4 A. & E. 664. "We find no authority," said the Court, "for saying that a person who cannot himself be a relator may not make affidavit in support of an application for a *quo warranto*."

(*m*) Ib.

(*n*) R. *v.* Anderson, 2 Q. B. 740; 2 G. & D. 113.

(*o*) R. *v.* Hedges, 11 A. & E. 163; 9 Dowl. 493.

claims, but has actually taken upon himself the office in question (*p*): it is not enough to say that he has "accepted" the office, without shewing how he has done so (*q*), as, in the case of a town councillor, by attending meetings of the council (*r*). But an affidavit stating the deponent's "information and belief" that the person moved against has exercised the office, is sufficient (*s*).

After long years of exercise of the office of mayor, an affidavit stating the relator's belief that the mayor had not been duly sworn in, was held insufficient (*t*).

The affidavits should shew the mode of election (*u*): and if an immemorial custom is relied on, the affidavit must state the deponent's belief that it is immemorial; it is not enough to state facts from which such a conclusion could be drawn (*x*).

If the objection to an election is that it was not in conformity with a charter, the affidavits should state that the charter was accepted, or that the usage had been in conformity to the charter (*y*).

[★164] ★ Where there is a charter, the question will be determined by a consideration of its terms alone, unless the affidavits specify a usage (*z*).

(*p*) R. *v.* Whitwell, 5 T. R. 85; R. *v.* Pepper, 7 A. & E. 745.

(*q*) R. *v.* Slatter, 11 A. & E. 505; R. *v.* Mayor of Winchester, 7 A. & E. 215; R. *v.* Tate, 4 East, 337.

(*r*) R. *v.* Quayle, 11 A. & E. 508.

(*s*) R. *v.* Slythe, 6 B. & C. 240; R. *v.* Harwood, 2 East, 177.

(*t*) R. *v.* Newling, 3 T. R. 310. See the cases referred to by Buller, J., at p. 311.

(*u*) R. *v.* Mein, 3 T. R. 598.

(*x*) R. *v.* Lane, 5 B. & Ald. 488.

(*y*) R. *v.* Barzey, 4 M. & S. 253. As to what amounts to an acceptance of a charter, see R. *v.* Hughes (7 B. & C. 708), where Lord Tenterden, C.J., said (p. 717): "It is said that there should have been a public meeting [of the burgesses], and a vote upon the question whether it should be accepted or not; and if that was absolutely necessary, the charter certainly has not been accepted. But no instance of any such meeting has been shewn, nor has any authority or dictum that such a meeting was necessary been adduced. It has long been the received opinion that there must be an acceptance; but the mode of proving it has always been left open. In general this acceptance of a charter has been proved by evidence of acting under it, and that is evidence in the case of a new as well as of an old charter." Littledale, J., added: "I am of opinion that any unequivocal act of the parties shewing their assent to accept and be governed by the charter is sufficient." Two hundred and sixty-two burgesses having voted at an election to the office of town sergeant, under the charter, and 129 more having signed a paper giving their assent to the acceptance of the charter, the sum of these two amounting to a majority of the entire number of burgesses, this was held by the Court to be a sufficient acceptance of the charter. Ib.

(*z*) R. *v.* Headley, 7 B. & C. 496.

If the ground of application be the acceptance of an office incompatible with one already held, the affidavits must shew, not only an acceptance and actual exercise of the second office, but also a valid appointment to it (*a*). They should also shew that the two are in fact incompatible (*b*), and that the defendant could by his own mere act divest himself of the former office; or, if the concurrence of another person was requisite, that such concurrence had been obtained (*c*).

Where an actual amotion is requisite to vacate an office, the affidavits should state that such amotion has taken place (*d*).

The grounds of objection to the validity of an election should be clearly stated, *e.g.*, the absence of due notice (*e*).

The affidavits should state when the defendant was elected, and establish a *primâ facie* case referable to that time; a relator cannot say to the Court that whenever the defendant was elected, he was not duly elected (*f*). In such a case the defendant is not bound to answer for the proceedings of any other day than that specified by the relator (*g*).

Where a relator's affidavit had omitted to state in whom the right of election to the office of portreeve was, the deficiency was (on argument of the rule), allowed to be supplied by the defendant's affidavit, disclosing the mode of election (*h*).

If the objection be that the person moved against had not a majority of legal votes, the affidavits should shew who are entitled ★ to vote, and that another [★ 165] person had a majority of such votes (*i*). It is not enough that the affidavits shew that a large number of persons voting were not qualified; they must shew for whom the votes of such persons were given (*k*).

A relator's affidavit stating his information and belief that the defendant has usurped the the office in question, if not contradicted by the defendant's on shewing cause, will be sufficient to induce the Court to grant the information (*l*).

(*a*) R. *v.* Day, 9 B. & C. 702 ; *cf.* Boston's case, cited Noy. 78.
(*b*) R. *v.* Pateman, 2 T. R. 777.
(*c*) See *per* Parke, J.. R. *v.* Patteson, 4 B. & Ad. 24.
(*d*) R. *v.* Heaven, 2 T. R. 772.
(*e*) R. *v.* Thomas, 8 A. & E. 183.
(*f*) *Per* Lord Denman in R. *v.* Rolfe, 4 B. & Ad. 842.
(*g*) Ib.
(*h*) R. *v.* Mein, 3 T. R. 598 ; as to criminal informations, vide R. *v.* Baldwin, 8 A. & E. 168, *ante*, p. 48.
(*i*) R. *v.* Mashiter, 6 A. & E. 153.
(*k*) R. *v.* Jefferson, 5 B. & A. 855.
(*l*) R. *v.* Harwood, 2 East, 177; R. *v.* Slythe, 6 B. & C. 240.

As to hearsay and belief in affidavits, it makes a great difference whether the matter of hearsay and belief goes to the validity of the title, or merely to the fact of the party having exercised the office; it is not considered sufficient in the former case, though it may be in the latter (*m*).

The various rules of order XXXVIII. of the Supreme Court Rules and Orders as to affidavits and depositions are made applicable to *quo warranto* proceedings (Order LXVIII., r. 2).

For the mode of framing or swearing affidavits, &c., in or out of England, the mode of filing and stamping them, the striking out of scandalous matter, the making of alterations, the affidavits of illiterate persons, &c., vide *ante*, pp. 42–44.

Forms of affidavits will be found in the Appendix.

Order *nisi*.

An order will not be granted, in the alternative, for a *quo warranto* or a mandamus (*n*).

One order may be granted in respect of several offices (*o*).

A single order may be granted against several defendants (*p*).

Every objection intended to be made to the title of a defendant on an information in the nature of a *quo warranto* must be specified in the order to shew cause or notice of motion, and no objection not so specified can be raised by the relator on the pleadings without the special leave of the Court or a judge (*q*).

This is a reproduction of a Reg. Gen. of Hil. T. 7 & 8 Geo. 4 (*r*).

(*m*) *Per curiam*, 6 B. & C. p. 243.

(*n*) R. *v.* Mayor of Leeds, 11 A. & E. 512.

(*o*) R. *v.* Thomas, 8 A. & E. 183. See also R. *v.* Patteson, 4 B. & Ad. 9.

(*p*) See R. *v.* Warlow, 2 M. & S. 75; R. *v.* Ramsden, 3 A. & E. 456; R. *v.* Hanley, 3 A. & E. 463, note.

(*q*) C. O. R. 55.

(*r*) The reason of the rule is thus stated by Blackburn, J., in R. *v.* Tugwell: "When the Court, being satisfied that there was a good objection, in the exercise of its discretion granted leave upon one point, the relator might start a number of other objections which the Court never intended to be raised, and on which, in its discretion, it would not have given leave to file the information; and, the Crown not being subject to the rule against duplicity in pleading, there were replications without stint, traversing all the allegations in the plea and raising all kinds of objections, to the great expense and annoyance of the person holding the office in question. The books swarm with instances of this abuse; and R. *v.* McKay (4 B. & C. 351) is an instance were there were sixteen general replications putting in issue the facts stated as inducement to the defendant's traverse, and thirty special replications setting up various customs as to the election

★ Where all the rule *nisi* stated was that [★ 166] the party against whom the application was made was not entitled to be appointed to the office, and that the relator was, the Court considered that the objection to the defendant's title was insufficiently stated (*s*).

The strictness applies only to the pleadings; the rule does not prevent the relator at the trial of the information taking objections not specified in the order *nisi* (*t*). It does not say that no evidence shall be given of any objection not specified in the order, nor does it contain any regulation as to evidence. The effect of it is that if, without the leave of the Court or a judge, the relator raises on the record any objections to the title of the defendant not specified in the order *nisi*, the replications will be stuck out (*u*).

Service of order.

The mode of serving the rule, when drawn up, is the same as in the case of criminal informations, as to which vide, *ante*, p. 53.

See form of order *nisi* in Appendix.

Shewing cause.

No person is allowed to shew cause against an order *nisi* unless he has previously obtained office copies of such order and of the affidavits on which it was granted (*x*).

As to enlarging the rule when the defendant is not ready to argue it, see the remarks made *ante*, pp. 53, 54, which are applicable to *quo warranto* informations also (*y*).

★ The defendant's affidavits may be enti- [★ 167] tled either simply "In the High Court of Justice, Queen's Bench Division," or with the addition "The Queen against A. B." (*z*).

As to the various grounds on which the Court may discharge the order, let it suffice to say in general (1) that all the grounds already given for refusing an order *nisi* in the first instance are also grounds for discharging it if granted; (2) that the suppression of any material fact in the affidavits on which the order was granted will be a reason for discharging it (*a*); and

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or appointment of bailiff of the borough, which office the defendant was alleged to have usurped. The object of the Reg. Gen. was to provide a remedy for this abuse" (9 B. & S. 375). As to the previous practice, see R. *v.* Brown, 4 T. R. 276.

(*s*) R. *v.* Edye, 12 Q. B. 936; See R. *v.* Preece, 5 Q. B. 94.

(*t*) R. *v.* Tugwell, 9 B. & S. 367; L. R. 3 Q. B. 704.

(*u*) *Per* Blackburn, J., ib.; *cf.* R. *v.* Preece, 5 Q. B. 95, note (*h*).

(*x*) C. O. R. 26. This was also the rule previously; see R. *v.* Inhabitants of Rotherham, 12 L. J. M. C. 17.

(*y*) See also *Anon.*, 2 Barnard. 340.

(*z*) R. *v.* Jones, 1 Str. 704; R. *v.* Harrison, 6 T. R. 60; R. *v.* Cole, 6 T. R. 640.

(*a*) See *per* Lord Tenterden, R. *v.* Hughes, 7 B. & C. 719.

(3) that the Court will not discharge the order on the merits, wherever a fair doubt in law exists, which ought to be raised on the pleadings, or where there is a conflict of testimony as to facts which a jury is the proper tribunal to settle. (*b*).

Where, however, the case set up by the relator's affidavits is completely answered by those of the defendant, the Court will discharge the order *nisi* (*c*).

As to the motives of the relator, vide *ante*, pp. 149, 157, 158.

The Court will not discharge the order merely on the ground that a similar attack had previously been made on the defendant's title and abandoned (*d*) ; even though the order had been obtained on an affidavit made by the same deponent (*e*) ; unless both applications are at the instance of the same relator (*f*).

Appeal.

An appeal lies to the Court of Appeal from either the grant or refusal of an order *nisi* by the Divisional Court, as well as from its decision in discharging or making absolute the order *nisi* (*g*).

Renewed application to Divisional Court.

Where the order *nisi* has been discharged, the same relator will not be permitted, on new affidavits explaining or contradicting those used on shewing cause, to attack the defendant's title for the same alleged defect; [★ 168] for this would be to encourage parties to ★ come before the Court in the first instance with an imperfect case, and then eke it out on a second application, by picking out inconsistencies in the opposing affidavits (*h*). Where, however, the order *nisi* has been discharged on the ground of disqualification of the first relator, the Court has allowed other relators, to whom there was no objection, to proceed (*i*).

Costs on discharging order.

The costs are wholly in the discretion of the Court (*k*).

The Court may discharge an order *nisi* for an infor-

(*b*) See *per* Lord Kenyon, in R. *v.* Mein, 3 T. R. 598; R. *v.* Quayle, 11 A. & E. 508; R. *v.* Carter, Cowp. 58; R. *v.* Sandys, 2 Barnard. 301; R. *v.* Godwin, 1 Doug. 387.

(*c*) R. *v.* Rolfe, 4 B. & Ad. 840; see also R. *v.* Orde, 8 A. & E. 420, note ; R. *v.* Sargent, 5 T. R. 466, and R. *v.* Chitty, 5 A. & E. 609. Cf. R. *v.* Fisher, 4 B. & S. 575.

(*d*) R. *v.* Bond, 2 T. R. 767.

(*e*) R. *v.* Alderman of New Radnor, 2 Lord Keny. 498.

(*f*) R. *v.* Orde, 8 A. & E. 420, n. Ib.

(*g*) Judic. Act, 1873, s. 19.

(*h*) The rule is the same in the case of criminal informations, *vide ante*, pp. 51, 52.

(*i*) R. *v.* Slythe, 6 B. & C. 244.

(*k*) Order LXV. All the rules of this order are made applicable to *quo warranto* proceedings (Order LXVIII., r. 2).

mation in the nature of a *quo warranto* with or without costs, and in its discretion may, upon such notice as may be just, direct the costs to be paid by the solicitor or other parties joining in the affidavits in support of the application, although he be not the proposed relator (*l*).

It was discharged in *R.* v. *Hughes* (*m*) with costs, on account of the suppression of material facts in the affidavits on which the rule had been obtained.

In other cases it has been discharged with costs on the ground that the charge was groundless and frivolous (*n*).

If the order is discharged on the merits, the general rule is that the defendant should have his costs; but not if it is discharged on any mere technical ground (*o*).

Even before the new Crown Office rule just cited, where it appeared that the party making the affidavit as relator was indigent, and was induced to make the application by another person, viz., an attorney, who was the real prosecutor, the Court ordered the costs to be paid by the attorney (*p*).

Costs on order absolute.

In making the order absolute the Court will also exercise a discretion as to costs.

★ No uniform rule for the exercise of the [★ 169] Court's discretion in this matter can be extracted from the cases.

In *R.* v. *Morton* (*q*), where the defendant resigned after the rule *nisi* against him had been obtained, and it appeared that the presiding officer had declared him a duly elected town councillor, and the town clerk had served a notice on him to accept the office, warning him that if he did not he would be liable to a fine, the Court made absolute the rule with costs; but ordered that, if it should be necessary to file the information, it should be done at the prosecutor's expense, the defendant undertaking to disclaim if required. This case was departed from in *R.* v. *Sidney* (*r*) before Erle, J., in the

(*l*) C. O. R. 56.

(*m*) 7 B. & C. 719.

(*n*) R. *v.* Lewis, 2 Burr. 780; R. *v.* Wardroper, 4 Burr. 1963.

(*o*) See R. *v.* Proprietors of Nottingham Journal, 9 Dowl. 1042.

(*p*) R. *v.* Greene, 4 Q. B. 646. "We take the rule to be," said Lord Denman, "that the Court may adjudge from all circumstances who is the party, and give costs against any party, or against an attorney, if the affidavit of the person sought to be charged, or any affidavit produced by an attorney, shews good ground for imposing them upon them respectively."

(*q*) 4 Q. B. 146.

(*r*) 2 L. M. & P. 149. This case is to be distinguished from R. *v.* May (2 L. M. & P. 144) before the same judge, where a person, without his knowledge, had been elected town councillor, and took office only to avoid the fine; and on learning that the

Bail Court, and in *R.* v. *Earnshaw* (*s*) in the full Court. And in *R.* v. *Hartley* (*t*), where the defendant, on shewing cause, admitted that his election was void and offered to resign or disclaim, the Court held that the rule must be made absolute without any terms, Crompton, J., saying: "The office being full, there must be a formal information and ouster to set the corporation right; and then the costs of an information and ouster are regulated by statute."

In a later case where the defendant had resigned office before the rule had been obtained, but it was necessary to have judgment of ouster for the purpose of substituting another candidate at once in the office, the Court made the rule absolute without costs, on the defendant's undertaking to enter a disclaimer; but the relator was to have costs of the information and disclaimer (*u*).

And in *R.* v. *Newcombe* (*x*), where the defendant, on being served with the rule, at once admitted that he had no claim to the office, and undertook to resign [★ 170] without shewing cause against the ★ rule, Blackburn and Lush, JJ., made the rule absolute without costs.

Where the defendant does not intend to defend, and, in order to prevent judgment by default, enters a disclaimer at the Crown Office; on the disclaimer being filed, judgment of ouster may be entered, and the costs taxed as in judgment by default: see No. 59 of the new Crown Office Rules.

Security for costs.

Where the nominal relators are acting merely as the instruments of, and at the instigation of, other persons, the Court has ordered security for costs to be given, especially where the nominal relators were persons in low and indigent circumstances (*y*).

But the Court interposes no such obstacle in the way of a relator who is really such, and who has a personal concern in the matter, notwithstanding his being in insolvent circumstances (*z*).

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validity of his election was questioned, not only offered to resign but, in fact, made two ineffectual efforts to do so. The information was granted only on the terms that it should be at the relator's cost; the defendant undertaking to make a valid resignation at his own cost, or, if it became necessary to file an information, at his own cost to disclaim.

(*s*) 22 L. J. Q. B. 174; cited by Crompton, J., 3 E. & B. 143.

(*t*) 3 E. & B. 143.

(*u*) R. *v.* Blizard, L. R. 2 Q. B. 55. (*x*) 15 W. R. 108.

(*y*) R. *v.* Trevenen, 2 B. & A. 339; R. *v.* Dudley, 7 Dowl. 700; R. *v.* Wakelin, 1 B. & Ad. 50.

(*z*) R. *v.* Wynne, 2 M. & S. 346. See also on this point the

In any cause or matter in which security for costs is required, the security shall be of such amount, and be given at such time or times, and in such manner and form, as the Court or a judge shall direct (*a*).

Where a bond is to be given as security for costs, it shall, unless the Court or judge shall otherwise direct, be given to the party or person requiring the security, and not to an officer of the Court (*b*).

Recognizance.

As soon as the order *nisi* is made absolute the relator must enter into the requisite recognizance; viz., in the penalty of £50 effectually to prosecute the information; and to abide by and observe such orders as the Court shall direct (*c*).

The recognizance must be filed at the Crown Office Department (*d*).

The rules as to recognizances set forth *ante*, p. 56, when dealing with criminal informations, apply also to recognizances in *quo warranto* proceedings. For form of recognizance see the Appendix.

Subsequent interference of Court.

It is a general rule that, where a proper case has been laid before the Court to induce them to grant the information, they have never ★ exercised any [★ 171] control over it afterwards, as to the manner in which it is to be conducted (*e*).

On this ground, where the information was for claiming to be a common councilman of a borough, and the relator by his replication attacked also the defendant's title as freeman, which had been stated in the introductory part of his plea, the Court refused to strike it out or direct their officer to enter a *nolle prosequi* (*f*).

Permitting defence against defendant's wish.

In some cases, where the Court is convinced that an important question is involved which the defendant is unwilling to contest, it will permit the defence to be carried on by other persons at their own risk and cost.

In a case where the titles of a number of corporators were, in the then state of the law, dependent on the validity of the defendant's title as mayor, the Court set aside a judgment of ouster to which the mayor had submitted by default, and allowed another person to defend the title; he indemnifying the mayor against all costs and charges (*g*). The whole Court was clear that the corporation had such an interest in the mayor's title to his office, and such a connection with it, and such a

language of Lord Tenterden in R. *v.* Wakelin, 1 B. & Ad. 53, distinguishing R. *v.* Trevenen (*ubi supra*). See the extract from the judgment of Lord Tenterden set forth, *ante*, p. 154.

(*a*) Order LXV. r. 6. (*b*) Id. r. 7. (*c*) C. O. R. 48.
(*d*) Ib. (*e*) *Per curiam*. R. *v.* Brown, 4 T. R. 277.
(*f*) Ib. (*g*) R. *v.* Dawes, 4 Burr. 2277.

right to see it supported if it was really a good one, that he ought not (as an honest man or as a just corporator) to desert and give it up, in prejudice to the rights of the corporation in general, or of particular corporators, when he was offered a complete indisputable indemnification on the part of those who desired to defend his right in order to support their own (*h*).

Consolidation of several orders *nisi*.

Where several orders *nisi* for informations in the nature of *quo warranto* have been granted against several persons for usurpation of the same offices, and all upon the same grounds of objection, the Court may order such orders to be consolidated, and only one information to be filed in respect of all of them (*i*).

Or the Court may in such a case order all proceedings to be stayed upon all but one, until judgment be given in that one (*k*).

[★172] ★ Where several informations were filed on the same grounds for exercising the office of alderman, and the relator was put under terms to proceed with one only till further order, the Court refused to direct that any party to the other information should be bound by the result (*l*).

And no order is to be made to consolidate or stay any proceedings against any defendant unless he gives an undertaking to disclaim, if judgment be given for the Crown, upon the information which proceeds (*m*).

Substitution of new relator.

A new relator may by leave of the Court, on notice of motion, be substituted for the one who first enters into the recognizance, on special circumstances being shewn (*n*).

The application must be made after two clear days' notice of motion, and be brought on as if it were an *ex parte* motion, and not put into the Crown paper (*o*).

It was not at all unusual for one person to make the affidavit on which the order had been obtained and made absolute, and for another or others to come forward as the relator or relators and have their names filed (*p*). See now No. 54 of the new Crown Office Rules, *ante*, p. 161.

(*h*) Ib. See also R. *v.* Marshall, 2 Chitt. 370.

(*i*) C. O. R. 58. The old practice was similar; see R. *v.* Foster, 1 Burr. 573, though Lord Ellenborough in one case (R. *v.* Warlow, 2 M. & S. 75) seems to have thought otherwise.

(*k*) Ib. (*l*) R. *v.* Cousins, 7 A. & E. 285.

(*m*) C. O. R. 58. (*n*) Ib. 57. (*o*) Ib. 255.

(*p*) See *per* Lord Denman, R. *v.* Dudley, 7 Dowl. 701. See, for an example of such a case, R. *v.* Alderson, 11 A. & E. 3, and R. *v.* Quayle, 9 Dowl. 548, where, after the rule had been made absolute, a new relator was substituted on the ground that the former relator had been compelled to go to the West Indies on business.

★ CHAPTER IV. [★ 173]

THE INFORMATION AND SUBSEQUENT PLEADINGS.

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The observations made *ante*, pp. 58, 59, as to criminal informations apply equally to *quo warranto* informations. The information.

In informations filed by leave of the Court, the information invariable states that "A. B., coroner and attorney of our present Sovereign Lady the Queen, in the Queen's Bench Division, &c., and for our Lady the Queen, at the relation of C. D.," &c.; but in cases which do not come within the statute of 9 Anne, c. 20, it would seem that the mention of a relator is not necessary (*a*).

The second and other counts are usually commenced thus; in the case of an *ex officio* information: "And the Attorney-General of our said Lady the Queen, for our said Lady the Queen, further giveth the Court here to understand and be informed that," &c.; or, in informations filed by leave of the Court: "And the said coroner and attorney of our said Lady the Queen, for our said Lady the Queen, further giveth the Court here to understand and be informed," &c.

The information need not state that it is filed by leave of the ★Court (*b*). "The Court gives [★ 174] the order, and the information is filed; but such leave never appears on the record" (*c*).

(*a*) Denison, J., speaking of this class, says: "The mention of a relator is no more than surplusage, and therefore will not hurt the common law judgment." (R. *v.* Williams, 1 Burr. 408.)

(*b*) Symmers *v.* R., Cowp. 489.

(*c*) *Per* Lord Mansfield, *Ib.*

It is not necessary to allege whether the office is by charter or by prescription, if it appears to be one which concerns the public.

An information calling on the defendant to shew by what authority he claimed to be bailiff of the village of Southwold was demurred to on the ground that it did not appear that Southwold was a corporation, so as to make this a usurpation upon the Crown; the office might be only a private one as bailiff of a manor. *Sed per curiam:* it is said to be an ancient town, and that this is a public office, an office of great trust and pre-eminence within the town relating to the administration of public justice: all of which was confessed by the demurrer. Therefore judgment was for the Crown (*d*).

One information against several persons and for several usurpations.

There may be one information against several persons, and against the same persons for different usurpations (*e*).

Lord Mansfield was of opinion that an information for different usurpations would have been good at common law; but if not good at common law, it was within 19 Geo. 2, c. 12, s. 4 (*f*).

In dealing with the objection to an information that it was against different persons, the same judge said: "The answer is, that the Act of Parliament gives a discretionary power to the Court to grant one or more informations according to the nature and circumstances of the case: and to suppose extravagant cases, or that the Court would be absurd enough to join two franchises in different corporations, is to suppose a case that cannot exist. The Legislature trusts the Court with the discretion of joining them; and, upon an application for leave, the Court goes into the nature of the question to be tried. In this case, nothing could be more proper than to join the several defendants and the respective franchises they claim, which are three. The right of election is exactly the same, the question is the same, and the evidence is the same" (*g*).

There are many instances of an information being [★ 175] granted in ★ respect of two or more distinct offices, though this is not the usual practice (*h*).

(*d*) R. *v.* Boyles, 2 Str. 836.

(*e*) See Symmers *v.* R., Cowp. 489; R. *v.* Foster, 1 Burr. 573; R. *v.* Brown, 3 T. R. 574, n.

(*f*) Ib. 500.

(*g*) Ib.

(*h*) See R. *v.* Patterson, 4 B. & Ad. 9 (alderman and justice of the peace); R. *v.* Thomas, 8 A. & El. 183 (town clerk and clerk of the peace); 2 Gude, 258 (recorder and justice of the peace);

Forms of information will be found in the Appendix.

Filing. The information (which is usually settled by counsel) is engrossed on parchment, signed by the Master of the Crown Office, and then filed. Though it may be filed before the relator's recognizance has been entered into, no process can issue before the recognizance is filed (*i*).

Ex-officio informations are, when signed by the Attorney-General, filed without any order of the Court or recognizance.

Amending. Leave to amend has almost always been given, even after the information has been demurred to.

Quashing. The Court will not quash a *quo warranto* information on motion, though both parties consent (*k*). But, where both parties consented, it has allowed the recognizances on both sides to be discharged (*l*).

Appearance. All the rules as to the appearance of the defendant and the mode of compelling it, set forth *ante*, pp. 59 *seq.*, in dealing with criminal informations, apply also in the case of *quo warranto* informations,

Disclaimer. If a defendant on an information in the nature of a *quo warranto* does not intend to defend, he may, to prevent judgment by default, enter a disclaimer at the Crown Office Department and file a copy there, and deliver another copy to the relator or his solicitor. Upon the disclaimer being filed judgment of ouster may be entered at the Crown Office Department, and the costs taxed as in judgment by default (*m*).

In an old case the Court, under peculiar circumstances, allowed a disclaimer to be entered by the defendant without costs (*n*); but the rule just quoted appears to give the relator a right to costs (*o*). See, however, Order LXV., r. 1, of the Supreme Court Rules, 1883, and C. O. R. 300.

For form of disclaimer see Appendix.

Order to plead. ★ On the appearance of the defendant, an [★ 176] order to plead may be drawn up at the Crown Office by the prosecutor or his solicitor (*p*).

This is an order of course (*q*).

Pleadings. Every pleading (other than a plea of guilty or not guilty) is to be intituled: "In the High Court of Justice, Queen's Bench Division," and shall be dated of the

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2 Gude, 259 (deputy recorder and justice of the peace); Symmers *v.* R., Cowp. 489; Coke's Entries, 527; R. *v.* Cousins, 7 A. & E. 285.

(*i*) C. O. R. 46; R. *v.* Mayor of Hertford, 1 Salk. 376.
(*k*) R. *v.* Edgar, 4 Burr. 2297. (*l*) Ib.
(*m*) C. O. R. 59. (*n*) R. *v.* Holt, 2 Chitt. 366.
(*o*) See R. *v.* Hartley, 3 E. & B. 143.
(*p*) C. O. R. 132. (*q*) Ib. 252.

day of the month and the year when the same was pleaded, and shall bear no other time or date. It shall be written or printed on paper, and a copy shall be delivered to the opposite party and be filed at the Crown Office (*r*).

Defence.

The defendant may plead to the information within such time and in like manner as if the information were a statement of claim in an action (*s*); that is, within ten days from the service of the information, or from the time limited for appearance, whichever shall be last, unless such time is extended by the Court or a judge (*t*).

No plea in abatement is allowed (*u*).

The time to plead may be extended, on application by summons to a judge at chambers, upon such terms and for such time as the judge in his discretion may think fit (*x*).

Pleading double, or several matters.

Before the Act of 32 Geo. 3, c. 58, a defendant could not plead double to a *quo warranto* information (*y*). Sect. 1 of that statute enabled the defendant to plead such several pleas as the Court on motion should allow (*z*). The whole of this Act has been repealed by 45 & 46 Vict. c. 50, s. 5, as to boroughs within the latter Act. As, however, the defendant's plea, as well as all subsequent pleadings are now to be had and taken as if in an action (*a*); and the defendant in an action not only may, but must (*b*), raise by his pleading all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, it would seem to [★177] ★ follow that he may, without leave, plead several matters by way of defence.

The provisions of No. 252 of the new Crown Office Rules as to pleading double or several matters (in cases coming within which an application, by way of motion to a Divisional Court, for an order *nisi* under 254 appears to be necessary), though r. 250 makes it applicable to all proceedings on the Crown side, will probably be held not to apply to *quo warranto* proceedings; on the ground that leave to plead several matters is not now necessary in *quo warranto*.

(*r*) Ib. 128. (*s*) Ib. 134. (*t*) Order XXI., r. 6.

(*u*) Order XXI., r. 20. Pleas in abatement to informations and indictments had been practically abolished by 7 Geo. 4, c. 64, s. 19.

(*x*) C. O. R. 133.

(*y*) R. *v.* Newland, Sayer, 96 ; R. *v.* Archbishop of York, Willes, 533.

(*z*) An unsuccessful attempt was made in R. *v.* Autridge, 8 T. R. 467, to limit the statute to cases where the defendant had held office for six years. It applied only to franchises of a corporate kind: R. *v.* Richardson, 9 East, 469; R. *v.* Highmore, 5 B. & A. 771.

(*a*) C. O. R. 134. (*b*) Order XIX., r. 15.

As to the Crown, it is clear, according to Willes, J. (*c*), that at common law the Crown was not precluded from pleading double, or pleading and demurring. "I speak with the sanction of the highest authority," says that learned judge, "when I say that the right of the Crown to plead double was unaffected by any of the statutes or rules of Court relating to pleading and procedure" (*d*).

Mode of traversing allegations of information.

Every allegation not denied specifically or by necessary implication, or stated to be not admitted, is to be taken as admitted (*e*).

The plea should not deny generally the grounds alleged in the information, but each allegation of fact not admitted should be specifically dealt with (*f*).

The same principles were acted on under the old system of pleading. Where the information described the office in question as an office "of great trust and pre-eminence within the borough touching the rule and government of the borough, and the election and return of burgesses to serve for the Commons in Parliament for the said borough," it was held that the plea admitted every part of this description which it did not specifically deny (*g*).

A defendant was not allowed to plead not guilty, or that he did not usurp the office or franchise in question; for if he had at all exercised the office or franchise his plea must shew by what authority he had done so (*h*).

Examples of defences.

But a plea that he did not exercise or use the office or franchise would be good (*i*).

★A plea that the defendant was duly [★ 178] elected or appointed to the office in question, without shewing how he was elected or appointed and how he was admitted to or took upon himself the office, would be considered bad (*k*). So strict was the necessity for the defendant to set forth fully and accurately his title, and to put it on the right ground, that in one case where in his plea the defendant grounded his title on a claim of prescription, which was found against him, the Court gave judgment of ouster, though it appeared on the face of the record that the defendant had a good title under a charter; and a repleader was refused (*l*).

(*c*) Tobin *v.* R., 14 C. B. N. S. 522.
(*d*) Ib. (*e*) Order XIX., r. 13. (*f*) Id., r. 17.
(*g*) R. *v.* McKay, 4 B. & C. 351.
(*h*) See R. *v.* Blagden, 10 Mod. 211, 296.
(*i*) R. *v.* Ponsonby, Sayer, 245; 1 Lord Keny. 1; 2 Bro. P. C. 211.
(*k*) See *per* Lord Mansfield, R. *v.* Leigh, 4 Burr. 2144.
(*l*) Ib. So the facts seem to have been regarded by Lord

In another case, where the defendant's mistake consisted in a defective setting forth of a really good title, a verdict against him was set aside on his paying the costs, and liberty to amend his plea was given (*m*).

To a *quo warranto* for exercising the office of common councilman of a borough, the defendant pleaded a charter of Will. 3 to the borough directing that the common councilmen should be elected in such manner as was used before a former charter of Chas. 2; and that before the charter of Chas. 2, the mayor, bailiffs, and burgesses used to elect, except at those times when there was any bye-law to regulate the mode of elections. The Court held the plea bad on demurrer, as not shewing what in fact was the usage before the charter of Chas. 2: the plea amounted merely to a statement that councilmen were elected by mayor, &c., except when they were elected in some other manner (*n*).

If the defendant succeeded on any plea which was a complete bar to the information, he was entitled to judgment; but if he only partially succeeded in proving such a plea, the judgment was one of ouster (*o*).

Further, if the only plea pleaded was bad, and shewed no title to the franchise, judgment of ouster might be given upon it as confessing an usurpation (*p*).

Partial defence.

[★ 179] ★ The defence may be partial in respect of time.

A defendant may plead as to part of the time he is alleged to have usurped the office or franchise, a confession of the usurpation, and as to the residue a justification on the ground of due election and admission. If as to part of the time he establishes his justification, the judgment is not of ouster, but merely that he be fined for the usurpation confessed (*q*).

He may, of course, plead that as to part of the time he did not exercise the office or franchise, and a justification as to the rest of the time.

As to amending the defence, see "Amendments," *post*, pp. 183, 184 (*r*).

Mansfield and Yates, J. But Aston, J. thought it did not appear that the defendants could have made a title at all.

(*m*) R. *v.* Philips, 1 Burr. 292.

(*n*) R. *v.* Birch, 4 T. R. 608.

(*o*) R. *v.* Downes, 1 T. R. 453; R. *v.* Philips, 1 Str. 394; R. *v.* Penryn, 1 Str. 582; 2 Bro. P. C. 294.

(*p*) R. *v.* Philips, *ubi supra.*

(*q*) R. *v.* Biddle, 2 Str. 952; R. *v.* Taylor, 2 Barnard. 238, 280, 316, 320; R. *v.* Clarke, 2 East, 75.

(*r*) Under the old system leave to amend was easily obtained (R. *v.* Grimes, 4 Burr. 2147), even after the plea had been demurred to, and a concilium moved for (R. *v.* Ellams, 7 Mod. 220),

Demurrer,

As by No. 134 of the New Crown Office Rules the defendant's plea and all subsequent pleadings are (subject to the rest of those rules) to be as if in actions, and in like manner as if the information were a statement of claim; and, as in actions, demurrers are abolished (*s*), and every party is entitled to raise by his pleading any point of law; which is to be disposed of by the judge who tries the cause at or after the trial, unless by consent of the parties or by order of the Court or a judge on the application of either party, it is set down for hearing and disposed of at any time before the trial (*t*), it would seem that the procedure substituted for demurrer in the case of actions is also to be adopted in the case of *quo warranto* informations (*u*).

It is clear, however, that whether a defendant can or cannot ★ demur to the information, he is not [★ 180] obliged to do so, and that he can raise in his statement of defence any legal objection to the information which might be raised by demurrer.

Pleadings subsequent to defence.

All subsequent pleadings are also to proceed in like manner as in an action (*y*).

Reply.

The reply is to be delivered within twenty-one days after the defence has been delivered, unless the time is extended by the Court or a judge (*z*).

No objection to the defendant's title can be raised on the pleadings without the special leave of the Court or a judge, other than the objection or objections specified in the order to shew cause or notice of motion (*a*).

The prosecutor, in answer to a plea that the defendant has held or executed the office or franchise for six years before the exhibiting the information, may reply

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and after argument of such a demurrer (R. *v.* Birch, 4 T. R. 608; R. *v.* Blatchford, 4 Burr. 2147).

(*s*) Order XXV., r. 1. (*t*) Ib., r. 2.

(*u*) C. O. R. 250, 252 (c), leave some on the point, being applicable to all proceedings on the Crown side. A demurrer admitted the truth of the allegations in the pleading demurrer to: see R. *v.* Boyles, 2 Str. 836; 2 Lord Raym. 1559; and R. *v.* McKay, 4 B. & C. 351. The Crown might at the same time demur to a plea and traverse the allegations in it: R. *v.* Diplock, 10 B. & S. 174, n.; R. *v.* Ginever, 6 T. R. 732, 733, n. It seems doubtful whether the old pleading rule (H. T. 4 Will. 4), which required the grounds of demurrer to be stated in the margin, applied to *quo warranto* proceedings: R. *v.* Woollett, 2 Cr. M. & R. 256; R. *v.* Alderson, 1 Q. B. 883, note (*b*).

(*y*) C. O. R. 134. (*z*) Order XXIII., r. 1.

(*a*) C. O. R. 55, repeating in substance a Reg. Gen. of H. T., 7 & 8 Geo. 4; previously to which the rule was different: see R. *v.* Brown, 4 T. R. 276.

any forfeiture, surrender, or avoidance by the defendant within the six years (*b*).

Under the old procedure a replication which merely denied an inference of law from the facts stated in the plea, but not the facts themselves, was considered bad (*c*).

The following are examples of replications: that the defendant was, at the time of the election relied on in his defence, disqualified to be elected (*d*); that he was not duly elected (*e*); that he was not lawfully admitted (*f*); that there was a former judgment of ouster against him after the election pleaded by him (*g*).

Pleadings subsequent to reply.

No pleading subsequent to reply, other than a joinder of issue, is to be pleaded without leave of the Court or a judge; and such pleading is to be then pleaded only on such terms as the Court or judge shall think fit (*h*).

Subject to this rule, every pleading subsequent to [★ 181] reply must be ★ be delivered within four days after the delivery of the previous pleading unless the time is extended by the Court or a judge (*i*).

One order only to plead, reply, rejoin, or plead subsequent pleadings is to be given, and such order may be drawn up and served as well during the sittings as in vacation; and every such order shall expire as follows, that is to say, every order to plead, in ten days next after service thereof, unless the time be extended by order of the Court or a judge, and every order to reply, rejoin, or plead subsequent pleadings in eight days next after service thereof, unless the time be extended as aforesaid (*k*).

Close of pleadings.

As soon as any party has joined issue upon the previous pleading of the opposite party simply, without adding any further or other pleading thereto, or has made default in delivering any pleading after defence, the pleadings are to be deemed to be closed (*l*).

General rules applicable to pleadings.

Specific denial.—Every allegation of fact in any pleading, if not denied specifically or by necessary im-

(*b*) C. O. R. 135.
(*c*) R. *v.* Blagden, 10 Mod. 211, 296. So also was a replication which alleged new matter not consistent with the defendant's plea: R. *v.* Knight, 4 T. R. 419.
(*d*) R. *v.* York, 2 G. & D. 105.
(*e*) R. *v.* Smith, 2 M. & S. 583.
(*f*) Mayor of Penryn's case, 1 Str. 582; R. *v.* Clarke, 2 East, 75; R. *v.* Courtenay, 9 East, 246.
(*g*) R. *v.* Clarke, 2 East, 75.
(*h*) Order XXIII., r. 2.
(*i*) Order XXIII., r. 3.
(*k*) C. O. R. 131.
(*l*) Order XXIII, r. 5 · Order XXXVII., r. 13.

plication, or stated to be not admitted, is to be taken as admitted (*m*).

Performance of conditions precedent.—Any condition precedent, the performance or occurrence of which is intended to be contested, must be specifically denied; and subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of either party is to be implied in his pleading (*n*).

All points relied on to be raised.—Each party must raise by his pleading all such grounds of defence or reply as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings (*o*).

No pleading is, except by way of amendment, to raise any new ground of claim, or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same (*p*).

Joinder of issue.—The reply may join issue upon the defence, and each party in his pleading, if any, subsequent to reply, may join issue upon the previous pleading. Such joinder of issue shall operate as a denial of every material allegation of fact in the pleading upon which issue is joined; but it may except any facts ★ which the party may be willing to admit, [★ 182] and shall then operate as a denial of the facts not so admitted (*q*).

Mode of denial.—When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. And so when a matter of fact is alleged with different circumstances, it shall not be sufficient to deny it as alleged with these circumstances, but a fair and substantial answer must be given (*r*).

Contents of documents.—Wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material (*s*).

Allegation of notice.—Wherever it is material to allege notice to any person of any fact, matter, or thing, it shall be sufficient to allege such notice as a fact, unless the form or the precise terms of such notice be material (*t*).

(*m*) Order XIX., r. 13. (*n*) Id., r. 14. (*o*) Id., r. 15.
(*p*) Id., r. 16. (*q*) Order XIX., r. 18. (*r*) Id., r. 19.
(*s*) Id., r. 21. (*t*) Id., r. 23.

Facts unnecessary to be alleged.—Neither party need in any pleading allege any matter of fact which the law presumes in his favour, or as to which the burden of proof lies upon the other side, unless the same has first been specifically denied (*u*).

Technical objection.—No technical objection is to be raised to any pleading on the ground of any alleged want of form (*x*).

Unnecessary or scandalous matter.—The Court or a judge may at any stage of the proceedings order to be struck out or amended any matter in any pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action; and may in such case, if they or he shall think fit, order the costs of the application to be paid as between solicitor and client (*y*).

Amendment with Leave.—The Court or a judge may, at any stage of the proceedings, allow either party to amend his pleadings in such manner and on such terms as may seem just; and all such amendments shall be made as may be necessary for the purpose of [★ 183] ★ determining the real questions or question in controversy between the parties (*z*).

Even under the old practice, Lord Mansfield considered it reasonable that if a defendant discovered before trial that he had pitched on the wrong defence, he should be at liberty, on proper terms, to quit it and insist on another which would better support his claim (*a*).

In another case, after trial and verdict for the Crown, the Court set aside the verdict and gave the defendant leave to amend his plea on payment of costs where, owing to a mistake, the plea did not accurately set forth the defendant's case (*b*).

Application for leave to amend.—Application for leave to amend any pleading may be made by either party to the Court or a judge in Chambers, or to the judge at the trial; and such amendment may be allowed upon such terms as to costs or otherwise as may seem just (*c*).

Amendment by writing or reprint.—A pleading may be amended by written alterations in the copy which has been delivered, and by additions on paper to be interleaved therewith if necessary, unless the amendments require the insertion of more than 144 words in any

(*u*) Order XIX., r. 25.
(*x*) Id., r. 26.
(*y*) Id., r. 27.
(*z*) Order XXVIII., r. 1.
(*a*) R. *v.* Blatchford. 4 Burr. 2147.
(*b*) R. *v.* Philips, 1 Burr. 292.
(*c*) Order XXVIII., r. 6.

one place, or are so numerous or of such a nature that the making them in writing would render the document difficult or inconvenient to read; in either of which cases the amendment must be made by delivering a print of the document as amended (*d*).

Failure to amend after order.—If a party who has obtained an order for leave to amend does not amend accordingly, within the time limited for that purpose by the order, or if no time is thereby limited, then within fourteen days from the date of the order, such order to amend shall, on the expiration of such limited time as aforesaid, or of such fourteen days, as the case may be, become *ipso facto* void, unless the time is extended by the Court or a judge (*e*).

Marking pleading as amended.—Whenever any pleading is amended, the same when amended shall be marked with the date of the order, if any, under which the same is so amended, and of ★ day on which [★ 184] such amendment is made, in manner following, viz: "Amended day of pursuant to order of dated the of " (*f*).

Delivery of amended pleading.—Whenever a pleading is amended, such amended pleading shall be delivered to the opposite party within the time allowed for amending the same (*g*).

Clerical mistakes.—Clerical mistakes in judgments or orders, or errors arising therein, arising from any accidental slip or omission, may at any time be corrected by the Court or a judge on motion or summons without an appeal (*h*).

General power of amendment.—And, generally, the Court or a judge may at any time and on such terms as to costs or otherwise as the court or judge may think just, amend any defect or error in any proceedings; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings (*i*).

Service of pleadings.—The rules as to the mode of service of pleadings and as to the obtaining of copies from the Crown Office referred to *ante* p. 71, when dealing with criminal informations, apply also to *quo warranto* proceedings.

Special case. The parties may concur in stating the questions of law in the form of a special case for the opinion of the Court (*k*).

(*d*) Id., r. 8. (*e*) Id., r. 7. (*f*) Order XXVIII., r. 9.
(*g*) Id., r. 10. (*h*) Id., r. 11. (*i*) Id., r. 12.
(*k*) C. O. R. 140.

Further: Even without the consent of the parties, if it appear to the Court or a judge, either from the pleadings or otherwise, that there is a question of law, which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried or before any reference is made to a referee or an arbitrator, the Court or judge may make an order accordingly, and may direct such question at law to be raised for the opinion of the Court, either by special case or in such other manner as the Court or judge may deem expedient; and all such further proceedings as the decision of such question of law may render unnecessary may thereupon be stayed (*l*).

Form.—Every special case is to be divided into par-
[★ 185] agraphs which, ★ as nearly as may be, are to be confined to a distinct portion of the subject, and every paragraph is to be numbered consecutively. The taxing officer is not to allow the costs of drawing and copying any special case not substantially complying with this rule, without the special order of the Court (*m*).

It must state concisely such facts and documents as may be necessary to enable the Court to decide the questions raised (*n*).

Every special case is to be printed by the plaintiff, and signed by the several parties or their solicitors, and filed by the plaintiff. Printed copies for the use of the judges are to be delivered by the plaintiff (*o*).

Upon the argument the Court and the parties are to be at liberty to refer to the whole contents of the documents referred to; and the Court is to be at liberty to draw from the facts and documents stated in any such special case any inference, whether of fact or law, which might have been drawn therefrom if proved at a trial (*p*).

Judgment by default.

Where any pleading is not entered within the time limited, judgment as for want of such a pleading may be entered at the opening of the office on the next following morning after the expiration of the time limited, upon filing an affidavit of service of the order to plead, reply, &c., as the case may be; unless an order of the Court or a judge extending such time shall have been obtained and served, in which case judgment shall not be signed until the day after the expiration of the time granted by such order (*q*).

(*l*) Order XXXIV., r. 2. Rule 9 as to the trial of issues of fact without pleadings is also, so far as applicable, to apply to *quo warranto* proceedings (C. O. R. 140).

(*m*) C. O. R. 142. (*n*) Order XXXIV., r. 1.
(*o*) Id., r. 3. (*p*) Id., r. 1. (*q*) C. O. R. 170.

In a case of judgment by default it will be assumed, against the defendant, that the office he is charged with usurping in a borough is a corporate office within the statute of Anne (*r*).

Motions and other applications.

The rules as to motions and other applications set forth *ante*, pp. 72–74, are applicable to all proceedings on the Crown side (*s*). Besides these the various rules of Order LII. of the Supreme Court Rules, 1883, are, so far as applicable, to apply to all civil proceedings on the Crown side. The two sets of rules are substantially the same.

To substitute new relator.—An application to substitute a new relator for the original relator must be made upon two clear days' ★ notice of motion, and [★ 186] be brought on as if it were an *ex parte* motion, and not put into the Crown paper (*t*).

Neglect by solicitor.

Where upon the trial of any cause or matter it appears that the same cannot conveniently proceed by reason of the solicitor for any party having neglected to attend personally, or by some proper person on his behalf, or having omitted to deliver any paper necessary for the use of the Court or judge, and which according to the practice ought to have been delivered, such solicitor shall personally pay to all or any of the parties such costs as the Court or judge shall think fit to award (*u*).

In causes and matters commenced since these rules came into operation, solicitors are entitled to charge and be allowed the fees set forth in the column headed "lower scale" in Appendix N. to the Supreme Court Rules, 1883, in all causes and matters; and no higher fees are to be allowed in any case, except such as are by Order LXV. otherwise provided for (*x*).

Time.

By No. 293 of the new Crown Office Rules, Order LXIV. of the Rules of the Supreme Court, 1883, is, so far as applicable, to apply to all civil proceedings on the Crown side.

The rules of this order which are applicable are the following:—

Interpretation of "month."—Where by these rules, or by any judgment or order given or made after the commencement of the principal Act, time for doing any act or taking any proceeding is limited by months, and where the word "months" occurs in any document which is part of any legal procedure under these rules,

(*r*) Lloyd *v.* The Queen, 31 L. J. Q. B. 208.
(*s*) C. O. R. 250.
(*t*) C. O. R. 255.
(*u*) Order LXV., r. 5.
(*x*) Order LXV., r. 8.

such time shall be computed by calendar months, unless otherwise expressed. (R. 1.)

When Sunday, &c., excluded.—Where any limited time less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceeding, Sunday, Christmas Day, and Good Friday, shall not be reckoned in the computation of such limited time. (R. 2.)

Time expiring on Sunday or close day.—Where the time for doing any act or taking any proceeding expires on a Sunday or other day on which the offices are closed, and by reason thereof such act or proceeding can- [★ 187] not be done or taken on that day, such ★ act or proceeding shall, so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open. (R. 3.)

Long vacation.—No pleadings shall be amended or delivered in the long vacation, unless directed by a Court or a judge. (R. 4.)

The time of the long vacation shall not be reckoned in the computation of the times appointed or allowed by these rules for filing, amending, or delivering any pleading unless otherwise directed by the Court or a judge. (R. 5.)

Time for giving security for costs.—The day on which an order for security for costs is served, and the time thenceforward until and including the day on which such security is given, shall not be reckoned in the computation of time allowed to plead, answer interrogatories, or take any other proceeding in the cause or matter. (R. 6.)

Enlarging or abridging time.—A Court or a judge shall have power to enlarge or abridge the time appointed by these rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require; and any such enlargment may be ordered, although the application for the same is not made until after the expiration of the time appointed or allowed. (R. 7.)

Enlarging time by consent.—The time for delivering, amending or filing any pleading, answer, or other document may be enlarged by consent in writing, without application to the Court or a judge. (R. 8.)

When service to be effected.—Service of pleadings, notices, summonses, orders, rules and other proceedings shall be effected before the hour of six in the afternoon,

except on Saturdays, when it shall be effected before the hour of two in the afternoon. Service effected after six in the afternoon on any week day except Saturday shall, for the purpose of computing any period of time subsequent to such service, be deemed to have been effected on the following day. Service effected after two in the afternoon on Saturday shall for the like purpose be deemed to have been effected on the following Monday. (R. 11.)

When time reckoned exclusively.—In any case in which any particular number of days, not expressed to be clear days, is ★ prescribed by these rules, the [★ 188] same shall be reckoned exclusively of the first day and inclusively of the last day. (R. 12.)

Cessation of proceedings for a year.—In any cause or matter in which there has been no proceeding for one year from the last proceeding had, the party who desires to proceed shall give a month's notice to the other party of his intention to proceed. A summons on which no order has been made shall not, but notice of trial although countermanded shall be deemed a proceeding within this rule. (R. 13.)

Effect of non-compliance with rules.

Non-compliance with any of the rules is not to render the proceeding void unless the Court or a judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular or amended, or otherwise dealt with in such manner and upon such terms as the Court or judge shall think fit (*y*).

Setting aside proceedings for irregularity.

No application to set aside any proceeding for irregularity is to be allowed unless made within a reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity (*z*).

Where an application is made to set aside proceedings for irregularity, the several objections intended to be insisted on are to be stated in the summons or notice of motion (*a*).

Where a summons is taken out to set aside any process or proceeding for irregularity with costs, and the summons is dismissed generally without any special directions as to costs, it is to be understood as dismissed with costs (*b*).

(*y*) C. O. R. 303; Order LXX., r. 1.
(*z*) Order LXX., r. 2.
(*a*) Order LXX., r. 3.
(*b*) Id., r. 4.

[★ 189] ★CHAPTER VII.

PROCEDURE FROM CLOSE OF PLEADINGS.

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Notice of trial.

ALL the rules as to notice of trial set forth *ante*, pp. 75, 76, when treating of criminal informations, apply equally in the case of *quo warranto* informations.

Time for giving notice.

As, by the new Crown Office Rules (No. 134), all proceedings subsequent to the defence are to be had as if in an action; notice of trial may be given with the reply (if any) whether it closes the pleadings or not, or at any time after the issues of fact are ready for trial (*a*).

Venue.

If no place of trial is named, the place of trial is, unless the Court or a judge shall otherwise order, to be the county of Middlesex (*b*).

Mode of trial.

Either party may obtain a trial with a jury, on application for it; otherwise the mode of trial will be by a judge without a jury (*c*).

But the Court or a judge may at any time (without [★ 190] application ★made) order the trial to be by a judge with a jury or by a judge sitting with assessors, or by an official referee or special referee, with or without assessors (*d*).

The Court or a judge may also, at any time or from time to time, order that different questions of fact aris-

(*a*) Order XXXVI., r. 11.
(*b*) Id., r. 11.
(*c*) Id., rr. 6 and 7.
(*d*) Order XXXVI., r. 7.

ing in the cause be tried by different modes of trial, or that one or more questions of fact be tried before the others, and may appoint the place or places for such trial or trials, and in all cases may order that one or more issues of fact be tried before any other or others (*e*).

Every trial of any question or issue of fact by a jury is to be held before a single judge, unless such trial be specially ordered to be held before two or more judges (*f*).

Trial at bar. As to trial at bar, see the rules set forth *ante*, pp. 79, 80.

Special jury. As to the mode of obtaining a special jury, vide *ante*, p. 81.

Entering record. As to entering the cause for trial, vide *ante*, p. 82.

There is now (strictly speaking) no *nisi prius* record; but the party entering the case for trial must deliver to the proper officer two copies of the whole of the pleadings, one for the use of the judge at the trial. Such copies are to be in print, except as to such parts (if any) of the documents as are, by the Rules of the Supreme Court, 1883, permitted to be written (*g*).

No warrant of *nisi prius* from the Attorney-General is any longer necessary (*h*).

Warrant of tales. But it seems that his warrant for a tales should still be procured (*i*).

Queen's counsel. Where the defendant is desirous of securing the advocacy of a Queen's counsel, the same course has been adopted as in the case of Criminal Informations. On this subject see the remarks made *ante*, p. 82.

Venue The Court has power to change the venue.

A suggestion on the record that the trial might be "more conveniently had" in the county of the substituted venue was considered to shew a sufficient ground for the change (*j*); being regarded as ★equiva- [★ 191] lent to a statement that the trial could not fairly be had in the county of the original venue (*k*).

6 & 7 Vict. c. 89, s. 5, enabled the Court, in any *quo warranto* information in respect of a corporate office in

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(*e*) Id., r. 8. (*f*) Id., r. 9. (*g*) Id., r. 30.
(*h*) C. O. R. 157.
(*i*) See Form of Warrant in the Appendix, *post*.
(*j*) Clark *v.* R., 3 E. & E. 147; affirmed in House of Lords, 9 H. L. Cas. 84; 31 L. J. Q. B. 175.
(*k*) See *per* Lord Campbell in the House of Lords, Ib. Lord Chelmsford said that to sustain the proceedings in error, something more than an irregularity should be shewn: the defendant ought to have demurred to the suggestion, instead of allowing the trial to go on without objection.

a borough, to order that the venue should be laid in the first instance in Middlesex or London; but this enactment has been repealed by s. 5 of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50).

Discovery and inspection before trial.

The right to discovery exists, strictly speaking, only in the case of civil proceedings; but *quo warranto* proceedings have long been considered civil, so far as this right is concerned (*l*).

Application should be made to the custodian of the documents which it is desired to inspect, for liberty to do so. Should permission be refused, the ordinary procedure is to apply to the Court for an order to compel him to grant inspection.

All orders are, during the sittings, to be made by the Court on motion which must be supported by affidavit, except in the case of orders demandable by the Crown as of right, or where it is not necessary to state matters of fact (*m*).

To enforce discovery and inspection, the Court might grant a mandamus, or an order entitled in the cause, which the Court would enforce by attachment. The authorities do not lay down any precise line between the kinds of cases in which the Court would act in the one way or in the other.

An order was in one case made in favour of relators to inspect the Court rolls and books of a manor (*n*); and, in another case, in favour of relators to inspect all the public books, records, and papers of and belonging to a particular borough "in whose custody soever they are," and to take copies of them or any part of them, on delivering and leaving with the town clerk a copy of the rule, at the same time shewing him the original (*o*).

In another case the relator obtained a rule absolute [★ 192] in the first ★ instance for a mandamus to inspect the books of a corporation, on the ground that a *quo warranto* was depending (*p*).

Lord Kenyon makes a distinction between an application for the inspection of corporation books by a member of the corporation and a similar application made by a stranger, that though it might be right in the former case to make an order for inspection of *all papers* relating to the corporation, yet in the latter

(*l*) Unlike, in this respect, Criminal Informations, where no inspection of documents in the defendant's possession will be granted. See R. *v.* Purnell, 1 Wils. 239, and R. *v.* Cornelius, referred to at pp. 241, 242 of the same volume. Vide *ante*, p. 82.
(*m*) C. O. R. 253.
(*n*) R. *v.* Shelley, 3 T. R. 141.
(*o*) R. *v.* Babb, 3 T. R. 579.
(*p*) R. *v.* Travanion, 2 Chitt. 366.

case the rule should be confined to the inspection of such papers only as respect the subject matter in dispute (*q*).

Further, Lord Kenyon was of opinion that the application by a member of the corporation should be for a mandamus, whereas in a *quo warranto* proceeding the application should be for a rule entitled in the case; as the Court could not grant a rule for the inspection of papers unless there was a cause in the Court (*r*).

As to the time for making the application, Ashurst, J., said: "There does not appear to be any reason why we should grant a rule for inspection till the rule for the *quo warranto* information is made absolute. It may be time enough to grant the rule for inspection after leave to file the information is granted, and before the trial of it. For I believe that many of these applications are made by way of experiment to see whether the corporation cannot be thrown into confusion" (*s*). This question does not appear to have been considered in any other case

No. 134 of the new Crown Office Rules seems now to make applicable to *quo warranto* proceedings the various rules of Order xxxi. of the Supreme Court Rules, 1883, as to discovery and inspection.

If the defendant does not deny that he has exercised the office or franchise in question, the *onus probandi* is on him, and he must begin.

Onus of proof.

If the defendant denies that he has exercised the office or franchise, the *onus* is on the prosecutor, and he must begin.

In a case in 1824, before Parke, J., the question—which the judge considered a new one—arose whether at the trial the relator or the defendant should begin? The judge allowed the defendant to begin, as, on the pleadings, the affirmative of the issue was upon ★ him: if, on the pleadings, the affirmative [★ 193] had been on the relator, he would have had the right to begin (*t*).

Many of the cases decided as to the title to exercise municipal offices have ceased to be of importance, as a *quo warranto* information will not now lie wherever the municipal election may be questioned by an election petition (vide *ante*, p. 158); and an election petition can determine the title in all cases except where the disqual-

(*q*) R. *v.* Babb, 3 T. R. 580; cf. R. *v.* Fraternity of Hostmen in Newcastle-on-Tyne, 2 Str. 1223; Harrison *v.* Williams, 3 B. & C. 162; Mayor of Southampton *v.* Graves, 8 T. R. 590.

(*r*) Ib. (*s*) Ib. (*t*) R. *v.* Yeates, 1 C. & P. 323.

ification arises subsequently to the election (45 & 46 Vict. c. 50, s. 87).

Witnesses.

When persons interested were incompetent as witnesses, the relator in an information, as being personally responsible for costs, was considered an incompetent witness for the Crown. Incapacity on the ground of interest was abolished by Lord Denman's Act (6 & 7 Vict. c. 85, supplemented by 14 & 15 Vict. c. 99, s. 1), in all proceedings civil and criminal.

Documentary evidence.

Minutes.—A minute of proceedings at a meeting of a town council, or of a committee, signed at the same or the next ensuing meeting by the mayor or by a member of the council or of the committee, describing himself as, or appearing to be chairman of the meeting at which the minute is signed, is to be received in evidence without further proof. (*u*).

Until the contrary is proved, every meeting of the council or of a committee, in respect of the proceedings whereof a minute has been so made, is to be deemed to have been duly convened and held, and all the members of the meeting are to be deemed to have been duly qualified; and where the proceedings are proceedings of a committee, the committee are to be deemed to have been duly constituted, and to have had power to deal with the matters referred to in the minutes (*z*).

Bye-laws.—The production of a written copy of a bye-law made by a municipal council under any statute, if authenticated by the corporate seal is, until the contrary is proved, sufficient evidence of the due making and existence of the bye-law, and, if it is so stated in the copy, of the bye-law having been approved and confirmed by the authority whose approval or confirmation is required to the making or before the enforcing of the bye-law (*a*).

[★194] ★ *Charters.*—Charters are most conveniently proved by the production of the originals under the great seal, the privy seal, or the Royal sign-manual; but as these are matters of public record (*b*), they might also, it seems, be proved by exemplifications under the great seal, or by examined copies (*c*).

Other documents.—Apart from statutory enactments, entries in the books of corporations publicly kept as such are admissible in evidence if made by the proper officer, or, in case of his absence or illness, by some per-

(*u*) Municipal Corporations Act, 1882, s. 22. As to the right to inspect and take copies of the minutes, see s. 233.
(*z*) Id., s. 22. (*a*) Id., s. 24. (*b*) 2 Bl. Com. 346.
(*c*) 2 Tay. on Evid. 1304.

son acting on his behalf or in his place (*d*); but they must be shewn to come from the proper custody (*e*).

Where the prosecutor produced in evidence a book which appeared to be only minutes of some corporate acts ten years previous, all written by the prosecutor's clerk, who was no officer of the corporation, and it was objected to by the other side, as having never been kept amongst or esteemed as one of the corporation books in which the entries were always made by the town clerk; there being some suspicion that the book was not genuine, the judge required an account where it had been kept for these ten years, and whether anybody had seen it before; and not getting a satisfactory explanation, he rejected it; and the Court upheld his ruling (*f*).

A copy of a letter fifty years old, found in one of the corporation's chests, was not allowed to be given in evidence (*g*); nor will an entry in the public books of a corporation be received in evidence if the entry is not of a public nature, but relates only to the private transactions of the corporation (*h*).

But every document of a public character may be proved by an examined copy, *i.e.*, a copy proved to have been examined with the original, and to correspond with it.

★ Where, in order to prove the defendant [★ 195] a freeman, a copy upon stamped paper was produced of a loose paper upon a file, which the witness said was also on a stamp, and was kept with other similar stamped entries on a file among the corporation papers; and it appeared there was also a book in which the acts of the corporation were kept, and where there was an entry more at large of the freeman's admission, made when he was originally admitted, but there was no stamp in the book; it was held that the loose paper being the only effectual act, and as having that which the law required, viz. the proper stamp, must be looked upon as the proper and original act of the corporation, and that a copy of that was good evidence (*i*).

(*d*) *Per* curiam, R. *v.* Mothersell, 1 Str. 93.

(*e*) Mercers of Shrewsbury *v.* Hart, 1 C. & P. 114.

(*f*) Ib. It is stated in Taylor on Evidence (p. 112, last ed.) to be still undecided whether the rule as to a deed thirty years old proving itself, applies to a deed under the seal of a corporation, and (Id., p. 1572) whether the attesting witness must not be called in the case of deeds under the corporation seal.

(*g*) R. *v.* Gwyn, 1 Str. 401.

(*h*) Marriage *v.* Lawrence, 3 B. & Ald. 142. As to the admissibility of the corporation books in evidence in an action between the corporation and one of its members, see Hill *v.* Manchester, &c., Co., 5 B. & Ad. 875.

(*i*) *Per* Noel, J., Rex *v.* Head, Peake's Ev. 87.

Production of original documents.—Wherever a copy is evidence, the Court will not order the production of an original document, unless some special reason is shewn, as a rasure or new entry (*k*).

Writs, records, pleadings, &c.—Office copies of all writs, records, pleadings, and documents filed in the High Court of Justice are admissible in evidence in all causes and matters, and between all persons or parties, to the same extent as the original would be admissible (*l*).

As the trial is to proceed as if in an action, the following provisions of the Supreme Court Rules, 1883, are applicable :—

Adjournment of trial.

The judge may, if he think it expedient for the interests of justice, postpone or adjourn the trial for such time, and upon such terms, if any, as he shall think fit (*m*).

Mode of giving evidence at trials.

In the absence of any agreement between the parties, and subject to the Supreme Court Rules, the witnesses at the trial shall be examined *vivâ voce* and in open court ; but the Court or a judge may at any time, for sufficient reason, order that any particular fact or facts may be proved by affidavit ; or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the Court or judge may think reasonable ; or that any witness whose attendance in Court ought for some sufficient cause to be dispensed with, be examined [★ 196] by interrogatories or ★ otherwise before a commissioner or examiner (*n*) ; provided that where it

(*k*) Brocas *v.* Mayor, &c., of London, 1 Str. 307.

(*l*) Order XXXVII., r. 4.

(*m*) Order XXXVI., r. 34.

(*n*) The procedure in such a case is regulated by the following rules of Order XXXVII. :—

Where any witness or person is ordered to be examined before any officer of the Court, or before any person appointed for the purpose, the person taking the examination shall be furnished by the party on whose application the order was made, with a copy of the writ and pleadings, if any, or with a copy of the documents necessary to inform the person taking the examination of the questions at issue between the parties (10).

The examination shall take place in the presence of the parties, their counsel, solicitors, or agents, and the witnesses shall be subject to cross-examination and re-examination (11).

The depositions taken before an officer of the Court, or before any other person appointed to take the examination, shall be taken down in writing by or in the presence of the examiner, not ordinarily by question and answer, but so as to represent as nearly as may be the statement of the witnesses, and when completed shall be read over to the witness and signed by him in the presence of the parties, or such of them as may think fit to attend. If the witness shall refuse to sign the depositions, the

appears to the Court or judge that the other party *bonâ* ★ *fide* desires the production of a witness for [★ 197]

examiner shall sign the same. The examiner may put down any particular question or answer if there should appear any special reason for doing so, and may put any question to the witness as to the meaning of any answer or as to any matter arising in the course of the examination. Any questions which may be objected to shall be taken down by the examiner in the depositions, and he shall state his opinions thereon to the counsel, solicitor, or parties, and shall refer to such statement in the depositions, but he shall not have power to decide upon the materiality or relevancy of any question (12).

If any person duly summoned by subpœna to attend for examination shall refuse to attend, or if, having attended, he shall refuse to be sworn or to answer any lawful question, a certificate of such refusal, signed by the examiner, shall be filed at the Central Office, and thereupon the party requiring the attendance of the witness may apply to the Court or a judge *ex parte* or on notice, for an order directing the witness to appear, or to be sworn, or to answer any question, as the case may be (13).

If any witness shall object to any question which may be put to him before an examiner, the question so put, and the objection of the witness thereto, shall be taken down by the examiner, and transmitted by him to the Central Office to be there filed, and the validity of the objection shall be decided by the Court or a judge (14).

In any case under the two last preceding rules, the Court or a judge shall have power to order a witness to pay any costs occasioned by his refusal or objection (15).

When the examination of any witness before any examiner shall have been concluded, the original depositions authenticated by the signature of the examiner, shall be transmitted by him to the Central Office, and there filed (16).

The person taking the examination of a witness under these Rules may, and if need be shall, make a special report to the Court, touching such examination, and the conduct or absence of any witness or person thereon, and the Court or a judge may direct such proceedings and make such order as upon the report they or he may think just (17).

Any officer of the Court, or person directed to take the examination of any witness or person, may administer oaths (19).

Any party in any cause or matter may by *subpœna ad testificandum* or *duces tecum* require the attendance of any witness before an officer of the Court or other person appointed to take the examination, for the purpose of using his evidence upon any proceeding in the cause or matter in like manner as such witness would be bound to attend and be examined at the hearing or trial; and any party or witness having made an affidavit to be used or which shall be used on any proceeding in the cause or matter, shall be bound on being served with such *subpœna* to attend before such officer or person for cross-examination (20).

Evidence taken subsequently to the hearing or trial of any cause or matter shall be taken as nearly as may be in the same manner as evidence taken at or with a view to a trial (21).

The practice with reference to the examination, cross-examination, and re-examination of witnesses at a trial, shall extend and be applicable to evidence taken in any cause or matter at any stage (22).

The practice of the Court with respect to evidence at a trial,

cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit (*o*).

Deposition.—The Court or a judge may, in any cause or matter where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before any officer of the Court or judge, or any other person, and at any place, of any witness or person; and may empower any party to any such cause or matter to give such deposition in evidence therein on such terms, if any, as the Court or a judge may direct (*p*).

Except where allowed by Order XXXVII. of the Supreme Court Rules and Orders, 1883, no deposition is [★198] to be given in evidence ★ at the trial without the consent of the party against whom it may be offered, unless the Court or a judge is satisfied that the deponent is dead or beyond the jurisdiction of the Court, or unable from sickness or other infirmity to attend the trial; in any of which cases the depositions certified under the hand of the person taking the examination, shall be admissible in evidence, saving all just exceptions, without proof of the signature to such certificate (*q*).

For form of commission to examine witnesses, see Form No. 36 in Appendix K. to the Supreme Court Rules, 1883.

Production of documents.

The Court or a judge may at any stage of the proceedings order the attendance of any person for the purpose of producing any writings or other documents named in the order, which the Court or a judge may think fit to be produced; provided that no person shall be compelled to produce under any such order any writing or other document which he could not be compelled to produce at the hearing (*r*).

Disobedience to order.

Any person wilfully disobeying any order requiring his attendance for the purpose of being examined, or producing any document, is to be deemed guilty of

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when applied to evidence to be taken before an officer of the Court or other person in any cause or matter after the hearing or trial, shall be subject to any special directions which may be given in any case (23).

No affidavit or deposition filed or made before issue joined in any cause or matter shall without special leave of the Court or a judge be received at the hearing or trial thereof, unless within one month after issue joined, or within such longer time as may be allowed by special leave of the Court or a judge, notice in writing shall have been given by the party intending to use the same to the opposite party of his intention in that behalf (24).

(*o*) Order XXXVII., r. 1. (*p*) *Id.*, R. 5.
(*q*) Order XXXVII., r. 18. (*r*) *Id.*, r. 7.

contempt of Court, and may be dealt with accordingly (*s*).

Expenses of witnesses.

Any person required to attend for the purpose of being examined, or of producing any document, shall be entitled to the like conduct money, and payment for expenses and loss of time, as upon attendance at a trial in Court (*t*).

All evidence taken at the trial may be used in any subsequent proceedings in the same cause or matter (*u*).

Amendment.

The provisions of Order XXVIII. of the Supreme Court Rules, 1883, as to amendment, are also made applicable to *quo warranto* proceedings (*x*).

By rule 1 of this Order the Court or judge may now at any stage of the pleadings, allow either party to alter or amend his pleadings in such manner and on such terms as may seem just, and all such amendments shall be made as may be necessary for ★ the [★ 199] purpose of determining the real questions in controversy between the parties (*y*).

Speeches to jury.

Upon a trial with a jury, the addresses to the jury are to be regulated as follows: the party who begins, or his counsel, shall be allowed at the close of his case, if his opponent does not announce any intention to adduce evidence, to address the jury a second time, for the purpose of summing up the evidence; and the opposite party or his counsel shall be allowed to open his case, and also to sum up the evidence, if any; and the right to reply shall be the same as heretofore (*z*).

Restrictions on cross-examination.

The judge may in all cases disallow any questions put in cross-examination of any party or other witness which may appear to him to be vexatious, and not relevant to any matter proper to be inquired into in the cause or matter (*a*).

Verdict.

The jury may in all cases give a general verdict.

Where the finding upon one issue rendered the other issues immaterial the judge might always, without the consent of the parties, discharge the jury from giving a verdict upon the issues thus become immaterial (*b*).

(*s*) *Id.*, r. 8.

(*t*), *Id.*, r. 9.

(*u*) Order XXXVII., r. 25.

(*x*) See Order LXVIII. r. 2, C. O. R. 299.

(*y*) The point in R *v.* Rowland, 3 B. & Ald. 130, would now be dealt with under this rule.

(*z*) Order XXXVI., r. 36. As to the advisability of the prosecutor opening his whole case in the first instance, see R. *v.* Bradley, 3 L. T. N. S. 853.

(*a*) Order XXXVI., r. 38.

(*b*) R. *v.* Johnson, 5 A. & E. 488; cf. Powell *v.* Sonnet, 1 Bligh, N. S. 552.

As to entering the verdict and all findings of fact, see No. 171 of the new Crown Office Rules, *ante*, p. 84.

Judgment at trial or adjournment for further consideration.

The judge may at, or after a trial, direct that judgment be entered for any or either party, or adjourn the case for further consideration, or leave any party to move for judgment (*c*).

No judgment shall be entered after a trial without the order of a Court or judge (*d*).

For form of judgment, see the Appendix, *post*.

As to entering judgment, see the rules set forth *ante*, p. 84, when dealing with criminal informations, which apply also to *quo warranto* proceedings.

Motion for judgment.

Unless where otherwise provided, the judgment of the Court is to be obtained by motion for judgment (*e*).

[★ 200] ★ *Where no judgment at trial.*—Where at the trial the judge or referee abstains from directing any judgment to be entered, the plaintiff may set down the case on motion for judgment. If he does not so set it down and give notice thereof to the other parties within ten days after trial, any defendant may set it down on motion for judgment, and give notice thereof to the other parties (*f*).

Where finding wrongly entered.—Where at, or after, a trial with a jury the judge has directed that any judgment be entered, any party may apply to set aside such judgment, and enter any other judgment, on the ground that the judgment directed to be entered is wrong, by reason that the finding of the jury upon the questions submitted to them has not been properly entered (*g*).

Where judgment wrongly entered on findings.—Where at, or after a trial, by a judge, either with or without a jury, the judge has directed that any judgment be entered, any party may apply to set aside such judgment, and to enter any other judgment, upon the ground that upon the finding as entered, the judgment so directed is wrong (*h*).

Where application to Court of Appeal.—An application under either of the two last preceding rules must be to the Court of Appeal unless, where there has been a trial with a jury, there is also a motion for a new trial, in which case it shall be to the Divisional Court by which such motion shall be heard (*i*).

Application to set down where some issues tried.—Where issues have been ordered to be tried, or issues or questions of fact to be determined in any manner,

(*c*) Order XXXVI., r. 39. (*d*) Ib.
(*e*) Order XL., r. 1. (*f*) Order XL., r. 2.
(*g*) Id., r. 3. (*h*) Order XL., r. 4. (*i*) Id., r. 5.

and some only of such issues or questions of fact have been tried or determined, any party who considers that the result of such trial or determination renders the trial or determination of the others of them unnecessary, or renders it desirable that the trial or determination thereof should be postponed, may apply to the Court or a judge for leave to set down the action on motion for judgment, without waiting for such trial or determination. And the Court or judge may, if satisfied of the expediency thereof, give such leave, upon such terms, if any, as shall appear just, and may give any directions which may appear desirable as to postponing the trial of the other questions of fact (*k*).

★*Time for setting down.*—No motion for judg- [★201] ment shall, except by leave of the Court or a judge, be set down after the expiration of one year from the time when the party seeking to set down the same first became entitled so to do (*l*).

Power of Court on Motion.—Upon a motion for judgment, or for a new trial, the Court may draw all inferences of fact not inconsistent with the finding of the jury; and, if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly; or may, if it shall be of opinion that it has not sufficient materials before it to enable it to give judgment, direct the motion to stand over for further consideration, and direct such issues or questions to be tried or determined, and such accounts and inquiries to be taken and made as it may think fit (*m*).

Where the judgment is for the relator, judgment of ouster may be entered for him in all cases (*n*). Judgment of ouster.

(*k*) Id., r 8. (*l*) Order XL., r. 9. (*m*) Id., r. 10.

(*n*) C. O. R. 134. The judgment on the ancient writ was that the franchise be seized into the king's hands; that on an information being that the defendant be fined and ousted from the particular franchise. The case against the corporation of the City of London in the time of Charles II. was an exception in this respect, the judgment being that the franchises, &c., be seized into the king's hands (3 Harg. St. Tr. 545). So far as appears, this is the only case in which such a judgment was given in a *quo warranto* information, and its effect was held not to dissolve the corporation; neither to extinguish or dissolve the body politic. "Wherever any judgment is given for the king for a liberty which is usurped, it is *quod extinguatur*, and that the person who usurped such a privilege, *libertat*, &c., *nullatenus intromittas*, &c., which is the judgment of *ouster;* but the *quo waranto* must be brought against particular persons. But where it is for a liberty claimed by a corporation, there it must be brought against the body politic; in which case there may be a seizure of the liberties, which will not warrant either the seizure or dis-

Judgment of ouster could not be given at common law.

"In the case of *R.* v. *Bennett* (Trin. 4 Geo. 1), the judges were equally divided in opinion upon the question whether judgment of ouster ought to be given at the common law, in an information in the nature of a *quo warranto*. As the judges were in that case [★ 202] ★ equally divided in opinion, and as there has not since been any determination upon the point, we are of opinion," said Ryder, C.J., in *R.* v. *Ponsonby* (*o*), "that judgment of ouster ought not to be given in an information in the nature of a *quo warranto*, unless the case of the person found or adjudged to be guilty be within the statute" (*p*).

Whether there can be a judgment of ouster *quousque* the happening of some event, or whether a judgment of ouster must not in all cases be of ouster absolute, was made a question in some cases.

In *R.* v. *Clarke* (*q*) Lord Kenyon seems to have been of opinion that there might be a judgment *quousque*, and Reynolds, J., was of a like opinion in *R.* v. *Hearle* (*r*). In *R.* v. *Courtenay* (*s*) it was argued that if the defendant had been well elected, but not duly sworn in, the judgment should be of ouster until he should be legally sworn in: the Court found it unnecessary to decide the point; but Lord Ellenborough, in delivering the judgment, said: "If it had arisen it is enough for us to say that, after diligent search, we can find no precedent of a judgment of ouster *quousque* upon the files of this Court" (*t*).

If any one material issue is found for the Crown, the Crown must have judgment (*u*).

The judgment of ouster is conclusive against the defendant. He will not be allowed to set up as a defence to a second information for exercising the same office that he had been duly elected before the first information and judgment of ouster, and that he was afterwards sworn in by virtue of a peremptory mandamus (*v*).

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solving of the corporation itself. For these reasons it was held that the judgment had not the effect of dissolving the corporation (Sir James Smith's case, 4 Mod. 58). The judgment as already observed, *ante*, p. 119, was annulled as illegal and arbitrary by 2 W. & M. Sess. 2, c. 8.

(*o*) Sayer, 247.

(*p*) Before the statute there had, however, been some instances of such a judgment (Ib. 246, 247).

(*q*) 2 East, 84. (*r*) 1 Str. 628. (*s*) 9 East. 246, 267.

(*t*) See also Mayor of Penryn's Case, 1 Str. 582 ; 2 Brown's P. C. 294; and R. *v.* Clarke, *ubi supra*.

(*u*) *Per* Lord Mansfield, R. *v.* Leigh, 4 Burr. 2146.

(*v*) R. *v.* Clarke, 2 East, 75. The mandamus in this case must

For cases in which judgment of ouster will be given notwithstanding that the defendant has ceased to exercise the office or franchise in question, vide *ante*, pp. 146, 147.

When judgment of ouster improper.

★ If the defendant confesses a usurpation [★ 203] as to part of the time charged in the information, but shews a good election as to the residue, the judgment is not one of ouster, but only one imposing a fine for the usurpation confessed.

In *R.* v. *Biddle and Taylor* (*w*), where the information charged a usurpation from the 20th of August to the first day of Hilary Term, and the defendant confessed a usurpation from the 20th of August to the 29th of September, and from thence insisted on an election, a special verdict being found, the prosecutor entered up judgment of ouster according to the opinion given in the *Mayor of Penryn's* case (*x*); but the Court ordered all the judgment to be expunged except that of a *capiatur pro fine*, such being the proper punishment for the defendant's acting before he was duly elected; it would be hard that a subsequent good election should be done away, as it would be by the judgment as entered.

Fine.

In the case of an information under the statute of Anne filed at the instance of a private relator, the fine is always merely nominal.

Judgment under 9 Ann. c. 20.

The following is the enactment of 9 Anne, c. 20, s. 5, on the subject of the judgment to be given: "In case any person or persons against whom any information or informations in the nature of *quo wrrranto* shall in any of the said cases [*i.e.*, cases of corporate offices] be exhibited in any of the said Courts, shall be found or adjudged guilty of an usurpation or intrusion into, or unlawfully holding and executing any of the said offices or franchises, it shall and may be lawful to, and for the said Courts respectively, as well to give judgment of ouster against such person or persons of and from any of the said offices of franchises, as to fine each person or persons respectively, for his or their usurping, intruding into, or unlawfully holding and executing any of the said offices or franchises; and also it shall and may be lawful to and for the said Courts respectively to give judgment that the relator or relators,

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have been granted *per incuriam;* for in the previous case of R. *v.* Hearle, 1 Str. 625, it was held that the Court would not grant a mandamus to swear a man in after judgment of ouster against him.

(*w*) 2 Str. 952; 2 Barnard. 238, 280, 316, 320.

(*x*) 1 Str. 582 (where the party was elected but not sworn).

in such information named, shall recover his or their costs of such prosecution: and if judgment be given for the defendant or defendants in such information, [★ 204] he or they, for whom such judgment ★ shall be given, shall recover his or their costs therein expended against such relator or relators."

Though a judgment may be wrong as a statute judgment, so much of it as is good at common law will stand. Thus, where, in a case not within the statute of Anne, judgment of ouster was given with costs, though the part of the judgment as to costs was wrong, the other (the common law) part was held good (*y*).

Setting aside judgment.

The Court may set aside a judgment of ouster at the instance of a party other than the defendant, *e.g.*, where a mayor had submitted to such judgment by default, though offered a complete indemnity by corporators who desired to try a substantial question by means of the information against him (*z*).

New trial.

As to the manner of moving for a new trial, the time for moving and extending the time, service of order *nisi*, &c., see the rules set forth *ante*, pp. 88, 89.

The old rule as to the time for moving was that the motion could be made at any time before judgment was signed, but not afterwards (*a*).

Judgment *non obstante veredicto*.

The procedure on applying to enter judgment *non obstante veredicto* is the same as in moving for a new trial (*b*).

Arrest of judgment.

The procedure on moving in arrest of judgment is of a like kind (*c*).

Costs.

It was the opinion of all the judges in *R.* v. *Amery* (*d*) that the Court, in giving judgment for the relator in an information under the statute of 9 Anne, c. 20, was bound to give judgment that the relator shall recover his costs of such prosecution.

If, in a case within the statute of Anne, the judgment for the relator said nothing about costs, he was entitled to sign judgment for his costs (*e*).

In *Lloyd* v. *The Queen* (*f*), where the defendant let judgment go by default, it was held that it must be taken as against him that the office he was charged with usurping was a corporate office within the statute; and therefore the relator was held entitled to his costs.

(*y*) R. *v.* Williams, 1 Burr. 402.
(*z*) R. *v.* Dawes, 4 Burr. 2277.
(*a*) R. *v.* Armstrong, 2 Str. 1102; see also R. *v.* Francis, 2 T. R. 484, and R. *v.* Malden, 4 Burr. 2135.
(*b*) C. O. R. 166. (*c*) Id. (*d*) 1 Anstr. 183.
(*e*) R. *v.* Dudley, 4 Jur. 915.
(*f*) 2 B. & S. 656; 31 L. J. Q. B. 209.

★ The question was argued in this case [★205] whether the statute of Anne applied to a claim to exercise a corporate office where no corporation in fact existed. The Exchequer Chamber was of opinion that it did. Bramwell, B., said: "If a man claims to exercise a corporate office and fails either because it is not a corporate office, or because there is not a corporation, the case is to my mind equally within the Act." Pollock, C.B., said: "I have a strong impression that the meaning of statute 9 Anne, c. 20, is that if a person intrudes himself into an office and claims it as really existing, he is within the statute whether there is a corporation or not."

It was held in the same case that if a judgment were entered without costs, it could not be altered in a subsequent term. But the Court or a judge may now, *at any time*, on such terms as are deemed just, amend any defect or error in any proceedings (*g*).

It was formerly held (*h*) that if the relator succeeded on any one issue he was entitled to costs on all the issues, even of those on which he failed; but this would not be so now, as Order LXV. (of the Supreme Court Rules, 1883), as to costs is made applicable to *quo warranto* proceedings (*i*).

It was also held that there was no power to give costs in any case not coming within the statute of Anne (*j*), *i.e.*, in the case of a franchise not of a corporate kind, either to the relator (*k*), or to the defendant (*l*); at any rate beyond the period of the relator's recognizance under 4 & 5 W. & M. c. 10; but rule 1 of the order just referred to now gives the Court or judge a discretionary power as to the costs of and incident to all proceedings in the Supreme Court.

Discretion as to costs.

Order LXV., r. 1, of the Supreme Court Rules, 1883 (which, by Order LXVIII., r. 2 (*m*), is made, so far as applicable, to apply to *quo warranto* proceedings), now provides that, subject to the provisions of the Act, the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court or judge;

(*g*) Order XXVII., r. 12, made applicable to *quo warranto* pleadings by Order LXVIII., r. 2.

(*h*) R. *v.* Downes, 1 T. R. 453; R. *v.* Dudley, 4 Jur. 915.

(*i*) Order LXVIII., r. 2; C. O. R. 65.

(*j*) R. *v.* Williams, 1 Burr. 402.

(*k*) R. *v.* Wallis, 5 T. R. 375, 379; R. *v.* Grimshaw, 5 D. & L. 249; R. *v.* McKay, 5 B. & C. 640; R. *v.* Backhouse, 7 B. & S. 911; R. *v.* Morgan, 26 L. T. N. S. 790.

(*l*) R. *v.* Hall, 1 B. & C. 237.

(*m*) See also C. O. R. 300.

[★ 206] . . . ★ Provided, that where any action, cause, matter, or issue is tried by a jury, the costs shall follow the event, unless the judge by whom such action, cause, matter, or issue is tried, or the Court, shall for good cause otherwise order.

A similar power is given to the Court of Appeal by Order LVIII., r. 4.

The word "event" has been held to mean the final result of the entire litigation; so that in case of a new trial, the party who succeeds in it is, in absence of an order to the contrary, entitled to the costs of both trials (*n*).

It has also been held that the word may be construed distributively, where there are several issues (*o*).

The wide discretion given by this rule—so wide as to enable the Court or judge to compel a successful plaintiff to pay all the costs of the unsuccessful defendant (*p*)—will, probably, be held not to take away the right given by the statute of Anne to a successful relator to have judgment for his costs; but it would seem to do away with the effect of the decisions (*q*) which restricted an unsuccessful relator's liability to the amount of his recognizance.

In any case of a corporate franchise it was held to be within the equity of the statute of Anne that a relator who gave notice of trial and did not proceed to trial should pay the defendant's costs (*r*).

If the prosecutor did not give notice of trial, and neglected to proceed to trial for one whole year after issue joined, he was also held liable to costs; but, in this case, not to costs generally, as under the statute of Anne, but only to the amount of his recognizance under 4 & 5 W. & M. (*s*).

In *ex-officio* informations no costs are payable, as the Crown neither receives nor pays costs.

[★ 207] The statute of Anne does not give a right to costs in respect of all offices of a corporation, but

(*n*) Creen *v.* Wright, L. R. 2 C. P. D. 354; Waring *v.* Pearman, 32 W. R. 429.

(*o*) Myers *v.* Defries, L. R. 5 Ex. D. 180; Ellis *v.* Desilva, L. R. 6 Q. B. D. 521.

(*p*) Harris *v.* Petherick, L. R. 4 Q. B. D. 611; Fane *v.* Fane, L. R. 13 Ch. D. 228.

(*q*) *Ante*, pp. 56, 205.

(*r*) Anon., Sayer, 130; see also R. *v.* Heydon, 3 Burr. 1304; R. *v.* Powell, 1 Str. 33, and R. *v.* James, Cas. temp. Hardw. 159. Mr. Cole thinks the costs allowed in these cases were only the usual costs of the day (p. 240).

(*s*) R. *v.* Morgan, 2 Str. 1042; R. *v.* Howell, Cas. temp. Hardw. 247.

only in respect of all offices of a similar kind to those mentioned in the Act, viz., mayor, bailiff, and portreeves "within cities, towns corporate and places;" by which it is to be understood places of a similar kind with those before mentioned. It does not extend to offices of a quasi corporate character, where there is no municipal corporation (*t*).

This statute is applicable only where the place is a corporate place and the office is also a corporate office. The statute does not, therefore, apply to any office in a town which is not a corporate one, nor to any office which is not a corporate one though it be an office in a corporate town (*u*).

The successful relator in an information against a member of a local board of health is therefore not entitled to his costs under the statute of Anne (*x*).

Disclaimer.—A disclaimer was allowed to be entered without costs in a case where the defendant was a very young man, who had not acted and had no intention of acting (*y*). But see now No. 59 of the New Crown Office Rules.

Taxation.—The costs are taxed by the Master of the Crown Office in the ordinary way.

General rules as to costs.

By Order LXV. of the Rules of the Supreme Court, 1883, which, by Crown Office Rule 300, is, so far as applicable, to apply to all civil proceedings on the Crown side, it is further provided, with respect to costs, as follows:—

Costs against solicitors.—Where upon the trial of any cause or matter it appears that the same cannot conveniently proceed by reason of the solicitor for any party having neglected to attend personally, or by some proper person on his behalf, or having omitted to deliver any paper necessary for the use of the Court or judge, and which according to the practice ought to have been delivered, such solicitor shall personally pay to all or any of the parties such costs as the Court or judge shall think fit to award (*z*).

★ *Security for Costs.*—In any cause or matter [★ 208] in which security for costs is required, the security shall be of such amount and be given at such times and in such manner and form as the Court or a judge shall direct (*a*).

(*t*) Cockburn, C.J., and *per* Blackburn, J., R. *v.* Backhouse, 7 B. & S. 921.

(*u*) Vide *ante*, pp. 115, 116, and the cases there cited.

(*x*) Id., followed in R. *v.* Morgan, 26 L. T. N. S. 790.

(*y*) R. *v.* Holt, 2 Chitt. 366.

(*z*) Order LXV., r. 5.

(*a*) Order LXV., r. 6.

Bond.—Where a bond is to be given as security for costs, it shall, unless the Court or a judge shall otherwise direct, be given to the party or person requiring the security, and not to an officer of the Court (*b*).

Higher and lower scale.—Solicitors shall be entitled to charge and be allowed the fees set forth in the column headed "lower scale" in Appendix N. [to the Judicature Rules and Orders] in all causes and matters, and no higher fees shall be allowed in any case, except such as are by Order LXV. otherwise provided for (*c*).

See this Appendix N. set forth in the Appendix to this work, *post.*

The fees set forth in the column headed "higher scale" in Appendix N. may be allowed either generally in the cause or matter, or as to the costs in any particular application made or business done in any cause or matter, if, on special grounds arising out of the nature and importance, or the difficulty or urgency of the case, the Court or a judge shall, at the trial or hearing, or further consideration of the cause or matter, or at the hearing of any application therein, whether the cause or matter shall or shall not be brought to trial or hearing or to further consideration (as the case may be), so order; or if the taxing officer, under directions given to him for that purpose by the Court or a judge, shall think that such allowance ought to be so made upon such special grounds as aforesaid (*d*).

Upon any reference to a taxing officer to tax a bill of costs of a solicitor for the purpose of ascertaining the amount due to such solicitor in respect thereof from the person to be charged therewith if such bill shall include charges for business done in any cause or matter, the taxing officer may allow the fees set forth in the column headed "higher scale" in Appendix N., in [★ 209] respect of such cause or ★ matter or in respect of any particular application made or business done therein, if on such special grounds, as are in the last preceding rule mentioned, he shall think that such allowance ought to be so made (*e*).

If in any case it shall appear to the Court or a judge that costs have been improperly or without any reasonable cause incurred or that by reason of any undue delay in proceeding under any judgment or order, or of any misconduct or default of the solicitor, any costs properly incurred have nevertheless proved fruitless to the person incurring the same, the Court or judge may

(*b*) Id., r. 7.
(*c*) Id., r. 8.
(*d*) Id., r. 9.
(*e*) Order LVX., r. 10.

call on the solicitor of the person by whom such costs have been so incurred, to shew cause why such costs should not be disallowed as between the solicitor and his client, and also (if the circumstances of the case shall require), why the solicitor should not repay to his client any costs which the client may have been ordered to pay to any other person, and thereupon may make such order as the justice of the case may require. The Court or judge may, if they or he think fit, refer the matter to a taxing officer for inquiry and report; and direct the solicitor in the first place to shew cause before such taxing officer, and may also, if they or he think fit, direct or authorize the official solicitor of the Supreme Court to attend and take part in such inquiry. Such notice (if any) of the proceedings or order shall be given to the client in such manner as the Court or judge may direct. Any costs of the official solicitor shall be paid by such parties, or out of such funds as the Court or a judge may direct; or, if not otherwise paid, may be paid out of such moneys (if any) as may be provided by Parliament (*f*).

Notice of Taxation.—One day's notice of taxing costs, together with a copy of the bill of costs, and affidavit of increase (if any), shall be given by the solicitor of the party whose costs are to be taxed to the other party or his solicitor, in all cases where a notice to tax is necessary (*g*).

Notice of taxing costs shall not be necessary in any case where the defendant has not appeared in person, or by his solicitor or guardian (*h*).

★ *Gross Sum for Costs.*—Upon interlocu- [★ 210] tory applications, where the Court or a judge shall think fit to award costs to any party, the Court or judge may by the order direct payment of a sum in gross in lieu of taxed costs, and direct by and to whom such sum in gross shall be paid (*i*).

Appeal.

Order LVIII. of the Supreme Court Rules and Orders, 1883, as to Appeals to the Court of Appeal, is made applicable to *quo warranto* proceedings (*k*).

Appeals re-hearing.

All appeals to the Court of Appeal are to be by way of rehearing and to be brought by notice of motion in a summary way, and no petition, case, or other formal proceeding other than such notice of motion is necessary (*l*).

The appellant may by the notice of motion appeal

(*f*) Id., r. 11. (*g*) Order LXV., r. 16. (*h*) Id., r. 17.
(*i*) Order LXV., r. 23. (*k*) C. O. R. 316.
(*l*) Order LVIII., r. 1.

Notice of motion.

from the whole or any part of any judgment or order; and the notice of motion shall state whether the whole or part only of such judgment or order is complained of, and in the latter case shall specify such part (*m*).

For form of notice of appeal, see Appendix, *post*.

Service of notice.

The notice of appeal shall be served upon all parties directly affected by the appeal, and it shall not be necessary to serve parties not so affected; but the Court of Appeal may direct notice of the appeal to be served on all or any parties to the proceeding, or upon any person not a party, and in the meantime may postpone or adjourn the hearing of the appeal upon such terms as may seem just; and may give such judgment and make such order as might have been given or made if the persons served with such notice had been originally parties (*n*).

Any notice of appeal may be amended at any time as to the Court of Appeal may seem fit (*o*).

Length of notice.

Notice of appeal from any judgment, whether final or interlocutory, shall be a fourteen days' notice, and notice of appeal from any interlocutory order shall be a four days' notice (*p*).

Powers of Court of Appeal.

Fresh evidence.

The Court of Appeal shall have all the powers and duties as to amendment and otherwise of the High Court, together with full discretionary power to receive [★ 211] further evidence upon questions of ★ fact; such evidence to be either by oral examination in Court, by affidavit, or by deposition taken before an examiner or commissioner. Such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought. Upon appeal from a judgment after trial or hearing of any cause or matter upon the merits, such further evidence (save as to matters subsequent as aforesaid) shall be admitted on special grounds only, and not without special leave of the Court (*q*).

Judgment.

The Court of Appeal shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require (*r*).

The powers aforesaid may be exercised by the said Court, notwithstanding that the notice of appeal may be that part only of the decision may be reversed or varied; and such powers may also be exercised in favor of all or any of the respondents or parties although such

(*m*) Order LVIII., r. 1. (*n*) Id., r. 2. (*o*) Id.
(*p*) Id., r. 3. (*q*) Order LVIII., r. 4. (*r*) Id.

respondents or parties may not have appealed from or complained of the decision (*s*).

Power to order new trial.

If upon hearing of an appeal it shall appear to the Court of Appeal that a new trial ought to be had, it shall be lawful for the said Court of Appeal, if it shall think fit, to order that the verdict and judgment shall be set aside and that a new trial shall be had (*t*).

Cross appeal.

It shall not under any circumstances be necessary for a respondent to give notice of motion by way of cross appeal; but if a respondent intends, upon the hearing of the appeal, to contend that the decision of the Court below should be varied, he shall within the time specified in the next rule, or such time as may be prescribed by special order, give notice of such intention to any parties who may be affected by such contention (*u*).

The omission to give such notice shall not diminish the powers conferred by the Act upon the Court of Appeal, but may, in the discretion of the Court, be ground for an adjournment of the appeal, or for a special order as to costs (*v*).

Length of such notice by respondent.

★Subject to any special order which may be [★ 212] made, notice by a respondent under the last preceding rule shall in the case of any appeal from a final judgment be an eight days' notice, and in the case of an appeal from an interlocutory order a two days' notice (*x*).

Entry of appeal.

The party appealing from a judgment or order shall produce to the proper officer of the Court of Appeal the judgment or order or an office copy thereof, and shall leave with him a copy of the notice of appeal to be filed; and such officer shall thereupon set down the appeal by entering the same in the proper list of appeals; and it shall come on to be heard according to its order in such list, unless the Court of Appeal or a judge thereof shall otherwise direct, but so as not to come into the paper for hearing before the day named in the notice of appeal (*y*).

For form of entry of appeal see Appendix, *post*.

Ex parte application.

Where an ex parte application has been refused by the Court below, an application for a similar purpose may be made to the Court of Appeal ex parte within four days from the date of such refusal, or within such enlarged time as a judge of the Court below or of the Appeal Court may allow (*z*).

Manner in which evidence to

When any question of fact is involved in an appeal, the evidence taken in the Court below bearing on such

(*s*) Id. (*t*) Order LVIII., r. 5. (*u*) Id., r. 6. (*v*) Id.
(*x*) Order LVIII., r. 7. (*y*) Id., r. 8. (*z*) Order LVIII., r. 10.

be adduced in Court of Appeal.

question shall, subject to any special order, be brought before the Court of Appeal as follows:

(*a*) As to any evidence taken by affidavit, by the production of printed copies of such of the affidavits as have been printed, and office copies of such of them as have not been printed;

(*b*) As to any evidence given orally, by the production of a copy of the judge's notes, or such other materials as the Court may deem expedient (*a*).

Printing evidence.

Where evidence has not been printed in the Court below, the Court below or a judge thereof, or the Court of Appeal or a judge thereof, may order the whole or any part thereof to be printed for the purpose of the appeal (*b*).

[★213] ★ Any party printing evidence for the purpose of an appeal without such order shall bear the costs thereof, unless the Court of Appeal or a judge thereof shall otherwise order (*c*).

Question as to judge's ruling how settled.

If, upon the hearing of an appeal, a question arise as to the ruling or direction of the judge to a jury or assessors, the Court shall have regard to verified notes or other evidence, and to such other materials as the Court may deem expedient (*d*).

No interlocutory order or rule from which there has been no appeal shall operate so as to bar or prejudice the Court of Appeal from giving such decision upon the appeal as may seem just (*e*).

Time within which appeal must be brought.

No appeal from any interlocutory order, or from any order, whether final or interlocutory, in any matter not being an action shall, except by special leave of the Court of Appeal, be brought after the expiration of twenty-one days, and no other appeal shall, except by such leave, be brought after the expiration of one year (*f*).

The said respective periods shall be calculated, in the case of an appeal from an order in Chambers, from the time when such order was pronounced, or when the appellant first had notice thereof, and in all other cases from the time at which the judgment or order is signed, entered, or otherwise perfected, or, in the case of the refusal of an application, from the date of such refusal (*g*).

Stay of execution.

An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, ex-

(*a*) Id., r. 11. (*b*) Id., r. 12. (*c*) Order LVIII., r. 12.
(*d*) Id., r. 13. (*e*) Id., r. 14. (*f*) Order LVIII., r. 15.
(*g*) Id.

cept so far as the Court appealed from, or any judge thereof, or the Court of Appeal, may order; and no intermediate act or proceeding shall be invalidated, except so far as the Court appealed from may direct (*h*).

When application must be made to Court below.

Wherever under these rules an application may be made either to the Court below or to the Court of Appeal, or to a judge of the Court below or of the Court of Appeal, it shall be made in the first instance to the Court or judge below (*i*).

Applications to be by motion.

★ Every application to a judge of the Court [★ 214] of Appeal shall be by motion, and the provisions of Order LII. shall apply thereto (*k*).

Execution.

Execution in *quo warranto* proceedings is also to be had and taken as if in an action (*l*); and Order XLII. of the Rules of the Supreme Court, 1883, is, as far as applicable, to apply to all civil proceedings on the Crown side (*m*).

The following are the rules of this order:—

Effect of service of judgment or order.—Where any person is by any judgment or order directed to pay any money or to deliver up or transfer any property real or personal to another, it shall not be necessary to make any demand thereof, but the person so directed shall be bound to obey such judgment or order upon being duly served with the same without demand. (R. 1.)

Judgment or order upon condition.—Where any person who has obtained any judgment or order upon condition does not perform or comply with such condition, he shall be considered to have waived or abandoned such judgment or order so far as the same is beneficial to himself; and any other person interested in the matter may, on breach or non-performance of the condition, take either such proceedings as the judgment or order may in such case warrant, or such proceedings as might have been taken if no such judgment or order had been made, unless the Court or a judge shall otherwise direct. (R. 2.)

Recovery of money.—A judgment for the recovery by or payment to any person of money may be enforced by any of the modes by which a judgment or decree for the payment of money of any Court whose jurisdiction is transferred by the Principal Act might have been enforced at the time of the passing thereof. (R. 3.)

Payment into Court.—A judgment for the payment of money into Court may be enforced by writ of se-

(*h*) Id., r. 16. (*i*) Id., r. 17. (*k*) Order LVIII., r. 18.
(*l*) C. O. R. 134. (*m*) C. O. R. 217.

questration, or in cases in which attachment is authorized by law, by attachment. (R. 4.)

Recovery of property.—A judgment for the recovery of any property other than land or money may be enforced:

By writ for delivery of the property:

By writ of attachment:

By writ of sequestration. (R. 6.)

[★215] ★ *Judgment to do or forbear.*—A judgement requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by writ of attachment, or by committal. (R. 7.)

Meaning of "writ of execution" and "issuing execution."—In these rules the term "writ of execution" shall include writs of *fieri facias*, *capias*, *elegit*, sequestration, and attachment, and all subsequent writs that may issue for giving effect thereto. And the term "issuing execution against any party" shall mean the issuing of any such process against his person or property as under the preceding rules of this order shall be applicable to the case. (R. 8.).

Judgment for conditional relief.—Where a judgment is to the effect that any party is entitled to any relief subject to or upon the fulfilment of any condition or contingency, the party so entitled may, upon the fulfilment of the condition or contingency, and demand made upon the party against whom he is entitled to relief, apply to the Court or a judge for leave to issue execution against such party. And the Court or judge may, if satisfied that the right to relief has arisen according to the terms of the judgment, order that execution issue accordingly, or may direct that any issue or question necessary for the determination of the rights of the parties be tried in any of the ways in which questions arising in an action may be tried. (R. 9.)

Documents to be produced before issue of execution.—No writ of execution shall be issued without the production to the officer by whom the same shall be issued of the judgment or order upon which the writ of execution is to issue or an office copy thereof shewing the date of entry. And the officer shall be satisfied that the proper time has elapsed to entitle the judgment creditor to execution. (R. 11.)

Præcipe for writ.—No writ of execution shall be issued without the party issuing it, or his solicitor, filing a *præcipe* for that purpose. The *præcipe* shall contain the title of the action, the reference to the re-

cord, the date of the judgment, and of the order, if any, directing the execution to be issued, the names of the parties against whom, or of the firm against whose goods the execution is to be issued; and shall be signed by or ★ on behalf of the solicitor of the party [★ 216] issuing it, or by the party issuing it, if he do so in person. The forms in Appendix (G) may be used, with such variations as circumstances may require. (R. 12.)

Indorsement on writ.—Every writ of execution shall be indorsed with the name and place of abode or office of business of the solicitor actually suing out the same; and when the solicitor actually suing out the writ shall sue out the same as agent for another solicitor, the name and place of abode of such other solicitor shall also be indorsed upon the writ; and in case no solicitor shall be employed to issue the writ, then it shall be indorsed with a memorandum expressing that the same has been sued out by the plaintiff or defendant in person, as the case may be, mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house of such plaintiff's or defendant's residence, if any such there be. (R. 13.)

Date of writ.—Every writ of execution shall bear date of the day on which it is issued. The forms in Appendix (H) hereto may be used, with such variations as circumstances may require. (R. 14.)

Expenses of execution.—In every case of execution the party entitled to execution may levy the poundage, fees and expenses of execution, over and above the sum recovered. (R. 15.)

Indorsement of direction to sheriff.—Every writ of execution for the recovery of money shall be endorsed with a direction to the sheriff or other officer or person to whom the writ is directed, to levy the money really due and payable and sought to be recovered under the judgment or order, stating the amount, and also to levy interest thereon, if sought to be recovered, at the rate of £4 per cent. per annum from the time when the judgment was entered up, provided that in cases where there is an agreement between the parties that more than £4 per cent. interest shall be secured by the judgment, then the indorsement may be accordingly to levy the amount of interest so agreed. (R. 16.)

Fi. fa. or elegit.—Every person to whom any sum of money or any costs shall be payable under a judgment or order shall, so soon as the money or costs shall become payable, be entitled to sue out one or more writ or writs of *fieri facias* or one or more ★ writ [★ 217]

or writs of *elegit* to enforce payment thereof, subject, nevertheless, as follows:—

(*a.*) If the judgment or order is for payment within a period therein mentioned, no such writ as aforesaid shall be issued until after the expiration of such period.

(*b.*) The Court or a judge may at or after the time of giving judgment or making an order, stay execution until such time as they or he shall think fit. (R. 17.)

Separate writs for money and costs.—Upon any judgment or order for the recovery or payment of a sum of money and costs there may be, at the election of the party entitled thereto, either one writ or separate writs of execution for the recovery of the sum and for the recovery of the costs; but a second writ shall only be for costs, and shall be issued not less than eight days after the first writ. (R. 18.)

Time for execution.—A party who has obtained judgment or an order, not being a judgment for payment of money or costs, or for the recovery of land, may issue execution in fourteen days, unless the Court or a judge shall order execution to issue at an earlier or later date with or without terms. (R. 19.)

Currency of writ and renewal.—A writ of execution, if unexecuted, shall remain in force for one year only from its issue, unless renewed in the manner hereinafter provided; but such writ may, at any time before its expiration, by leave of the Court or a judge, be renewed by the party issuing it, for one year from the date of such renewal, and so on from time to time during the continuance of the renewed writ, either by being marked with a seal of the Court bearing the date of the day, month, and year of such renewal, or by such party giving a written notice of renewal to the sheriff, signed by the party or his attorney, and bearing the like seal of the Court; and a writ of execution so renewed shall have effect, and be entitled to priority, according to the time of the original delivery thereof. (R. 20.)

Proof of renewal.—The production of a writ of execution, or of the notice renewing the same, purporting to be marked with such seal as in the last preceding rule mentioned, shewing the same to have been renewed, shall be sufficient evidence of its having been so renewed. (R. 21.)

[★ 218] ★ *Execution within six years.*—As between the original parties to a judgment or order execution may issue at any time within six years from the recov-

ery of the judgment or the date of the order. (R. 22.)

After six years.—In the following cases, viz.:—

(*a.*) Where six years have elapsed since the judgment or date of the order, or any change has taken place by death or otherwise in the parties entitled or liable to execution;

(*b.*) Where a husband is entitled or liable to execution upon a judgment or order for or against a wife;

(*c.*) Where a party is entitled to execution upon a judgment of assets *in futuro;*

(*d.*) Where a party is entitled to execution against any of the shareholders of a joint stock company upon a judgment recorded against such company, or against a public officer or other person representing such company, the party alleging himself to be entitled to execution may apply to the Court or a judge for leave to issue execution accordingly. And such Court or a judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties, shall be tried in any of the ways in which any question in an action may be tried. And in either case such Court or judge may impose such terms, as to costs or otherwise, as shall be just. (R. 23.)

Execution on order.—Every order of the Court or a judge in any cause or matter may be enforced in the same manner as a judgment to the same effect. (R. 24.)

By or against a person not a party.—Any person not being a party to a cause or matter, who obtains any order or in whose favour any order is made, shall be entitled to enforce obedience to such order by the same process as if he were a party to such cause or matter; and any person not being a party to a cause or matter, against whom obedience to any judgment or order may be enforced, shall be liable to the same process for enforcing obedience to such judgment or order as if he were a party to such cause or matter. (R. 26.)

★*Auditâ querelâ abolished.*—No proceeding [★219] by *auditâ querelâ* shall hereafter be used; but any party against whom judgment has been given may apply to the Court or a judge for a stay of execution or other relief against such judgment, upon the ground of facts which have arisen too late to be pleaded; and the Court

or judge may give such relief and upon such terms as may be just. (R. 27.)

Saving of previous rights.—Nothing in this order shall take away or curtail any right heretofore existing to enforce or give effect to any judgment or order in any manner or against any person or property whatsoever. (R. 28.)

Order of writs.—Nothing in this order shall effect the order in which writs of execution may be issued. (R. 29.)

Mandatory judgment, &c.—If a mandamus, granted in an action or otherwise, or a mandatory order, injunction, or judgment for the specific performance of any contract be not complied with, the Court or a judge, besides or instead of proceedings against the disobedient party for contempt, may direct that the Act required to be done may be done so far as practicable by the party by whom the judgment or order has been obtained, or some other person appointed by the Court or judge, at the cost of the disobedient party; and upon the act being done, the expenses incurred may be ascertained in such manner as the Court or a judge may direct, and execution may issue for the amount so ascertained, and costs. (R. 30.)

Corporations.—Any judgment or order against a corporation wilfully disobeyed may, by leave of the Court or a judge, be enforced by sequestration against the corporate property, or by attachment against the directors or other officers thereof, or by writ of sequestration against their property. (R. 31.)

Discovery in aid of execution.—When a judgment or order is for the recovery or payment of money, the party entitled to enforce it may apply to the Court or a judge for an order that the debtor liable under such judgment or order, or in a case of a corporation that any officer thereof be orally examined as to whether any and what debts are owing to the debtor, and whether the debtor has any and what property or means of satisfying the judgment or order before a judge or an [★ 220] officer of the Court as the ★Court or judge shall appoint; and the Court or judge may make an order for the attendance and examination of such debtor, or of any other person, and for the production of any books or documents. (R. 32.)

In case of any judgment or order other than for the recovery or payment of money, if any difficulty shall arise in or about the execution or enforcement thereof, any party interested may apply to the Court or a judge,

and the Court or judge may make such order thereon for the attendance and examination of any party or otherwise as may be just. (R. 33.)

The costs of any application under the last-mentioned rule and of any proceedings arising from or incidental thereto, shall be in the discretion of the Court or a judge (*n*).

Costs.—The costs of any application under the last two preceding rules or either of them, and of any proceedings arising from or incidental thereto, shall be in the discretion of the Court or a judge, or in the discretion of such officer as in r. 32 mentioned, if the Court or a judge shall so direct. (R. 34.)

Costs of appeal.

The Court of Appeal is empowered to make such order as to the whole or any part of the costs of the appeal as may be just (*o*).

Security for costs.

Such deposit or other security for the costs to be occasioned by any appeal shall be made or given as may be directed under special circumstances by the Court of Appeal (*p*).

On the subject of security for costs, see further, *ante*, p. 170.

Appeal to House of Lords.

From the judgment of the Court of Appeal there may be a further appeal to the House of Lords.

For the procedure on appeal to the House of Lords, vide *ante*, pp. 106, 107 and the Standing Orders of the House of Lords in the Appendix, *post*.

★ Note. [★ 221]

The cab committee of a town council adopted the following course of proceeding, in cases of offences against the bye-laws made by the council for the regulation of cabs, hackney carriages, and other licensed vehicles:—

On any complaint being made against a cabdriver, the committee issued a summons (having the city arms at the top, and the name of the town clerk at the bottom), calling on him to appear before them and answer the complaint. On the party appearing, and the complaint being considered well founded, a fine was imposed: if the fine were not paid, no attempt was made to enforce it, but the cabdriver was summoned in the ordinary way before justices for breach of the bye-laws.

An application for an order *nisi* for a *quo warranto* information

(*n*) Order XLII., r. 34.

(*o*) Order LVIII., r. 4. Under the old procedure, the judgment of the Court below, in favour of the relator with costs, being affirmed by the Exchequer Chamber on writ of error, the relator was held not entitled to the costs of the proceedings in error; Rowley *v.* R., 6 Q. B. 668.

(*p*) Id., r. 15.

against the committee, for this usurpation of jurisdiction, was made to a Divisional Court and refused; apparently on the ground that it was understood to be a jurisdiction by way of arbitration, voluntarily submitted to, and not compulsory or judicial in its character. But on appeal the Court of Appeal granted an order *nisi;* on the argument of which the committee agreed to discontinue their proceedings, without the necessity of issuing an information, in case the Court of Appeal should consider their proceedings unwarranted. The Court of Appeal were unanimously of that opinion.

Lord Esher, M.R., said he was sure that these gentlemen had believed that in doing what they had done, they had acted for the public advantage. But if they had acted as a Court, though from the best motives, and they had usurped an authority which no private person could legally assume, the Court could not tolerate it, merely because it had been done with the best motives. Nor was it a question what these gentlemen had intended, but what they had done. The question was whether they had acted as a Court; and that depended primarily and principally upon the so-called summonses, issued under the arms of the city and the signature of the town clerk, and calling upon the parties summoned to appear before the committee and "answer the complaint" against them. There was every symbol of authority; everything that could indicate that the summonses were issued by authority; and they ran in the form usual in magistrates' summonses:—"You are hereby required to attend before the committee." And if the parties appeared they were heard, and the matter was "decided;" and orders were made for the pay- [★ 222] ment of ★ fines "imposed," or sums of money "adjudged" or awarded. And if the party summoned did not appear, orders were made upon him in his absence for the payment of money. The forms of summonses issued shewed that consent was not required; and what was done shewed that it was not arbitration, but that the committee acted as a court, and so usurped a judicial authority or jurisdiction which they had no right to assume. That being so, the Court was not at liberty to consider whether it was beneficial or otherwise to the public, and were bound to hold it illegal: *Ex parte* Wiseman, *Re* Cab Committee of the Council of the Corporation of Manchester, *Times*, 27th October, 1886.

★PART III. [★223]

MANDAMUS.

CHAPTER I.

NATURE AND ORIGIN OF THE JURISDICTION.

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Blackstone's definition of mandamus.

"A WRIT of mandamus" in the words of Blackstone (*a*), "is, in general, a command issuing in the King's name from the Court of King's Bench, and directed to any person, corporation, or inferior Court of Judicature within the King's Dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the Court of King's Bench has previously determined, or at least supposes to be consonant to right and justice. It is a high prerogative writ of a most extensively remedial nature . . . and issues in all cases where the party hath a right to have anything done, and hath no other specific means of compelling its performance."

Meaning of "prerogative writ"

By the phrase "high prerogative writ," is meant a writ issuing, not as ordinary writs, of strict right, but at the discretion (*b*) of the ★ Sovereign act- [★224]

(*a*) 3 Com. 110.

(*b*) This is not, of course, an arbitrary discretion, but one guided and limited by fixed principles which will be enumerated hereafter. "When the Court of Queen's Bench is invited to make an order by way of peremptory mandamus, it is no more in the power of that Court than of any other Court to direct that to be done which is not lawful. Upon a prerogative writ there arise many matters of discretion which may induce the judges to withhold the grant of it, matters connected with delay, or possibly with the conduct of the parties; and when the judges have exercised their discretion in directing that which is in itself law-

ing through that Court, in which the Sovereign is supposed to be personally present.

"A mandamus," says Lord Mansfield (*c*), "is certainly a prerogative writ, flowing from the King himself, sitting in this Court, superintending the police and preserving the peace of this country, and will be granted wherever a man is entitled to an office or a function, and there is no other adequate legal remedy for it." But the Court ought to be satisfied that they have ground to grant a mandamus; "it is not a writ that is to issue of course, or to be granted merely for asking" (*d*).

Origin. The origin of the writ (*e*), and the various changes which it underwent before attaining its present form and character, have been made the subject of some learned disquisitions of historical but not practical interest. Suffice it to say that instances of its being granted by the Court of King's Bench may be found in very early times; according to some authorities, so early as the reigns of Edward II. and Edward III. (*f*), though its [★ 225] systematic use may ★ be said to date from

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ful to be done. I apprehend that no other Court can question their discretion in so directing. But, with regard to that which is in itself not lawful to be done, they are open to correction, as every other Court is by the Court of Appeal or by a higher authority."—*Per* Lord Hatherley, R. *v.* Wigan, L. R. 1 App. Cas. 622.

(*c*) R. *v.* Barker, 1 W. Bl. 352.

(*d*) *Per* Lord Mansfield, R. *v.* Askew, 4 Burr. 2189.

(*e*) "It seems originally to have been one of that large class of writs or mandates by which the sovereign of England directed the performance of any desired acts by his subjects; the word 'mandamus' in such writs or letters missive having doubtless given rise to the present name of the writ. These letters missive or mandates, to which the generic name of mandamus was applied, were in no sense judicial writs, being merely commands issuing directly from the sovereign to the subject, without the intervention of the Courts; and they have now become entirely obsolete. The term mandamus, derived from those letters missive, seems gradually to have become confined in its application to the judicial writ issued by the King's Bench, which has by a steady growth developed into the present writ of mandamus."—High, Extraordinary Remedies, 5.

(*f*) See Dr. Godland's case, referred to in Widdrington's case, 1 Lev. 23, and R. *v.* Askew, 4 Burr. 2186, where Lord Mansfield says: "In a MS. book of reports which I have seen the reporter cites (in reporting Dr. Bonham's case) a mandamus in the time of Ed. III., directed to the University of Oxford commanding them to restore a man that was *bannitus;* which shows both the antiquity and extent of this remedy by mandamus." But, according to Windham, J., in an earlier case (R. *v.* Patrick, 2 Keb. 167), most, if not all, of the early mandamuses were *auctoritate Parliamenti*, by petitions presented to the King and Parliament, from which the House of Lords was then distinct, and a court of judicature, and the King gave present answers *unicâ voce*, without an Act of Parliament.

about the close of the seventeenth century. Since that time it has been the recognized ordinary method of compelling the performance of public duties, where no other legal method of enforcing them existed.

Granted where no other remedy.

In one case, where it was questioned whether a mandamus was the proper remedy, Lord Mansfield said: "No other has been suggested; and if there is no other, then this Court is bound to interpose by the prerogative writ of mandamus; if the office be of consequence and value" (*g*). In another case, Lee, C.J., said; "Where a man has *jus ad rem*, it would be absurd, ridiculous, and a shame to the law, if he could have no remedy; and the only remedy he can have [*i. e.*, in that particular case] is by mandamus" (*h*).

Not against Crown or its servants.

It is never granted against the Crown, or the officers or servants of the Crown as such. "That there can be no mandamus to the Sovereign there can be no doubt, both because there would be an incongruity in the Queen commanding herself to do an act, and also because the disobedience to a writ of mandamus is to be enforced by attachment" (*i*).

Granted only by Queen's Bench Division.

In the opinion of the present Master of the Rolls (shared by the Late Lord Justice James), the high prerogative writ is, under the Judicature Act, as it was before, a remedy that can be granted only in the Queen's Bench Division (*k*).

Distinguished from other kinds of mandamus.

By way of general introductory observation, it need only be added that the high prerogative writ of mandamus, of which we are about to treat, must be carefully distinguished from the mandamus which could be granted by any of the superior Courts at Westminster, under 13 Geo. 3, c. 63, s. 44, to examine witnesses ★ in India; or to examine witnesses in any [★ 226] other place under the Sovereign's dominions in foreign parts, under 1 Will. 4, c. 22, s. 1; also from the mandamus which could be claimed by action under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125, ss. 68–77 (*l*)); and, finally, from the mandamus which,

(*g*) R. *v.* University of Cambridge, 1 W. Bl. 552.

(*h*) R. *v.* Montacute, 1 W. Bl. 64.

(*i*) *Per* Lord Denman, R. *v.* Powell, 1 Q. B. 361; R. *v.* Commissioners of Customs, 5 A. & E. 380.

(*k*) Glossop *v.* Heston & Isleworth Local Board, L. R. 12 Ch. D. 122. Cf. the language of James, L.J., at pp. 115, 116; see *Re* Paris Skating Rink Co. L. R. 6 Ch. D. 731.

(*l*) The ideas of Lord Campbell, C.J., on this point appear to have been a little confused. In the case of an action (Benson *v.* Paull, 6 E. & B. 273), brought soon after the passing of the Act, for a mandamus to compel the granting of a lease pursuant to contract, his Lordship said that the enactment must be confined to

by s. 25, sub-s. 8 of the Supreme Court of Judicature Act, 1873, may be granted, by an interlocutory order of the High Court, in all cases in which it shall appear to the Court to be just or convenient that such order should be made.

"I think," said Brett, M.R., "the mandamus spoken of in the 8th sub-section of the 25th section of the Judicature Act is not the prerogative mandamus, but only a mandamus which may be granted to direct the performance of some acts, of something to be done; which is the result of an action where an action will lie" (*m*), whereas, as will be more clearly seen hereafter, the prerogative writ is only granted in cases where the performance of the duty sought to be enforced could not be compelled by action.

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such duties as might be enforced by "the prerogative writ of mandamus," adding: The Act facilitates the obtaining of such a writ, and extends the powers of granting it to other Courts as well as to the Queen's Bench."

(*m*) L. R. 12 Ch. D. 122.

★CHAPTER II. [★227]

GENERAL RULES APPLICABLE TO MANDAMUS.

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General rules as to grant of mandamus.

THE principal general rules as to the cases in which the high prerogative writ of mandamus will be granted are the following:—

(1.) The applicant must have a legal right to the performance of some duty of a public and not merely private character.

(2.) There must be no other effective lawful method of enforcing the right.

(3.) The Court must be convinced that the remedy by mandamus will be practically effective to secure the object aimed at.

(4.) There must have been a demand made upon the person or body on whom the performance of the duty sought to be enforced is incumbent, and a neglect and refusal by such person or body to perform it.

(5.) The application must be to compel the performance of some duty which has not been done; it must not be to order the undoing of an act which has been done.

(6.) The application must be made in proper time, *i.e.*, it must not have been delayed too long; neither, on the other hand, must it be made prematurely; and

★(7.) The Court must be satisfied as to [★228] the propriety of the motives of the applicant.

Where, in accordance with these principles, a mandamus is not obtainable, the Court will not grant it, though all objection should be waived (*a*).

Legal right to performance of a public duty requisite.

1. There must be a legal right on the part of the applicant to the performance, by the person or body against whom he applies, of some duty of a public and not merely private character.

"There ought in all cases," said Lord Ellenborough, "to be a specific legal right as well as the want of a specific legal remedy, in order to found an application for a mandamus" (*b*).

The right of the applicant may arise from, and the duty which he seeks to enforce may be imposed by, either (1) statute (*c*); (2) charter; or (3), the common law or custom (*d*), as, *e.g.*, the right of burial in the parish churchyard (*e*).

No authorities need be cited in proof of the proposition that a right must exist; for "the existence of a legal right or obligation is the foundation of every writ of mandamus" (*f*).

But the Courts held also that a mandamus would not be granted to enforce a right not of a legal but of a merely equitable character, however extreme the inconvenience to which the applicant might be put by having to seek his relief in a Court of Equity (*g*).

In refusing a mandamus, Lord Ellenborough said: "There being no legal right in the present applicant, [★ 229] without which there can ★ be no claim on the Court to exercise its jurisdiction, I think we ought

(*a*) *Per* Lord Campbell, C.J., R. *v.* Lords of Treasury, 16 Q. B. 359.

(*b*) R. *v.* Archbishop of Canterbury, 8 East, 220.

(*c*) "It is settled that where an entirely new right is given by statute, mandamus is the remedy, though it is otherwise where an old right only is enforced:" *per* Wood, V.C., Simpson *v.* Scottish, &c., Insurance Co., 1 H. & M. 629.

(*d*) See R. *v.* College of Surgeons, 2 Burr. 892, where the custom set up was to have a duly qualified apprentice admitted and bound; R. *v.* Mayor of London, 1 T. R. 423, where the question was as to the custom regulating the appointment of auditor of the chamberlain's and bridgemaster's accounts.

(*e*) See *Ex parte* Blackmore, 1 B. & Ad. 122. R. *v.* Coleridge, 1 Chitt. 588.

(*f*) *Per* Lord Campbell, *Ex parte* Napier, 18 Q. B. 695. See the observations of the Court in R. *v.* Hertford College, L. R. 3 Q. B. D. 701; see also R. *v.* Littledale, Ir. L. R. 12 Q. B. &c. Div. 97.

(*g*) See *per* Lord Denman, C.J., in R. *v.* Godolphin, 8 A. & E. 347, and *per* Lord Kenyon, C.J., in R. *v.* Stafford, 3 T. R. 651, *post*, p. 233, note (*z*); R. *v.* Orton, 14 Q. B. 139, where it is pointed out (p. 146) that in R. *v.* Kendall, 1 Q. B. 366, the point was not taken.

not to grant the application" (*h*). In the language of another learned judge (*i*), the writ of mandamus cannot issue, unless the applicant has a specific legal right to that which he prays for, and this at the hands of those from whom he requires it: a complete legal right must exist.

A mortgagee of turnpike tolls under 3 Geo. 4, c. 126, s. 81, having only an equitable right (*k*) was held not entitled to a mandamus to compel the trustees of the road to pay the interest on his mortgage (*l*).

No instance is to be found in our books of any attempt by a clergyman, even after presentation, to obtain a writ of mandamus to compel his institution to a presentative benefice; and for this plain reason, that there is a legal remedy open to those who present him, by *quare impedit*, and he has himself no legal right whatever (*m*).

A mandamus to register a ship was refused because the title of the applicants was founded on a sale to them by the survivor of two trading partners, in which the personal representative of the deceased partner had not joined (*n*).

The Court refused a mandamus to compel the lord of a manor to admit the applicant, where his title was clearly barred by lapse of time (*o*); also to compel trustees under a road Act to repair a part of it turned through an enclosure, where their legal liability to repair it was not proved (*p*).

If the application is to enforce the provisions of an Act of Parliament, the Court must see clearly that the case is one which falls within the meaning of the Act (*q*).

★ If a statute authorizes the doing of any [★ 230] act which causes an injury to the Queen's subjects at

(*h*) R. *v.* Bishop of Exeter, 2 East, 466; see also R. *v.* Bishop of London, 1 Wils. 11; R. *v.* Barnard's Inn, 5 A. & E. 17; R. *v.* Archbishop of Canterbury, 8 East, 219; *Ex parte* Ricketts, 4 A. & E. 999; R. *v.* Bond, 6 A. & E. 905.

(*i*) Coleridge, J., *Re* De Bode, 6 Dowl. 789.

(*k*) See Pardoe *v.* Price, 11 M. & W. 427; 12 L. J. Ex. 285; 14 L. J. Ex. 212; 16 L. J. Ex. 192.

(*l*) R. *v.* Balby Turnpike Road, 22 L. J. Q. B. 124.

(*m*) *Per cur.*, R. *v.* Orton, 14 Q. B. 146.

(*n*) R. *v.* Collector of Customs, 2 M. & S. 223.

(*o*) R. *v.* Agardsley, 5 Dowl. 19.

(*p*) R. *v.* Llandilo Commissioners, 2 T. R. 232.

(*q*) *Per* Le Blanc, J., R. *v.* Heywood, 1 M. & S. 630; R. *v.* Justices of Denbighshire, 14 East, 285; R. *v.* Clear, 7 D. & R. 393; *Ex parte* King, 7 East, 91; R. *v.* Justices of N. R. Yorkshire, 2 B. & C. 286; *Re* Smyth, 4 A. & E. 976; R. *v.* Recorder of Bath, 9 A. & E. 871; R. *v.* Hughes, 3 A. & E. 425; *Re* Lodge, 2 A. & E. 123; R. *v.* Collector of Customs, 1 M. & S. 262.

large, the only appropriate remedy viz., by indictment, is taken away; and where there is no legal right to compensation, a mandamus will not be granted (*r*).

If the alleged right is founded on immemorial custom, *primâ facie* proof of the existence of the custom must be given (*s*). "Where an application is made for a mandamus, and the question turns upon a custom which the parties litigating desire to have tried, the Court will grant the writ for that purpose, or they will direct an issue to be tried. But in such cases, a foundation must be laid before them, and they must see that there is some ground for the application. It will not be granted merely for asking" (*t*).

And where the right sought to be vindicated by mandamus is opposed to a long-established custom, the Court will require the right to be very strictly made out (*u*).

If a mandamus is sought to restore or admit to an office, the applicant must make out a *primâ facie* title to the office, and shew, at least, that he has complied with all the forms necessary to constitute his right (*x*).

If the application is made to compel a new election, on the ground that the election which has taken place is void, the Court must be enabled to see clearly the invalidity of the election which has taken place (*y*).

No member of the public has an enforceable right to be admitted a member of any of the Inns of Court (*z*); and the same is true as to a College (*a*). If either of these bodies acts capriciously in refusing admission, the Court can give no remedy; because there [★ 231] ★ has been no violation of any legal right (*b*). The same was held as to admission as an advocate of the Court of Arches (*c*).

A mandamus to compel payment of his superannuation allowance to a metropolitan police constable was

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(*r*) R. *v.* Bristol Dock Co., 12 East, 428.

(*s*) R. *v.* Bishop of London, 1 T. R. 331.

(*t*) *Per* Lord Mansfield, Id., p. 333, 334. Cf. the language of Abbott, C.J., in R. *v.* West Looe, 3 B. & C. 684, 685. See also R. *v.* Field, 4 T. R. 125, and R. *v.* Hale, 9 A. & E. 339.

(*u*) R. *v.* Chester, 1 M. & S. 101; R. *v.* Mayor, &c., of London, 1 T. R. 423; R. *v.* Palmer, 8 East, 426.

(*x*) R. *v.* Jotham, 3 T. R. 575.

(*y*) *Per* Lord Denman, C.J., R. *v.* Governors of Sandford, 1 N. & P. 338.

(*z*) R. *v.* Lincoln's Inn, 4 B. & C. 855; cf. R. *v.* Barnard's Inn, 5 A. & E. 17.

(*a*) *Per* Bayley, J., 4 B. & C. 860.

(*b*) *Per* Bayley, J., 4 B. & C. 860.

(*c*) R. *v.* Archbishop of Canterbury, 8 East, 213; R. *v.* Hertford College, L. R. 3 Q. B. D. 693.

refused, because the allowance was not payable as of right, and might at any time be revoked at the discretion of the Secretary of State (*d*).

In former times a mandamus was held to lie only to compel the performance of a ministerial duty; but modern cases have gone much further, and a mandamus will now be granted, when requisite, to compel the performance of any public duty (*e*).

But the existence of the duty must be clearly established. A mandamus to compel the residence within their borough of aldermen was refused, where such residence was not shewn to be necessary to the discharge of the duties of the office or required by charter (*f*).

Where the duty to act is conditional on the approval of another person or body being obtained, there is no right to a mandamus until such approval has been given (*g*).

Duty must be of a public nature.

The duty must be of a public, and not merely private, character.

"The reason why we grant these writs," said Lord Hardwicke (*h*), "is to prevent a failure of justice, and for the the execution of the common law, or of some statute, or of the king's charter; and never as a private remedy . . . . Nay, the old cases went so far as to refuse a mandamus in all cases where an assize lay; and though the Court is not so strict nowadays, yet it shews in what light these writs are considered: now here there don't appear to be any failure of justice, but only a dispute about a private right;" and on that ground the mandamus was refused (*i*).

"The Court," said Bayley, J., in a later case (*k*) "never grants this writ except for public purposes and to compel the performance of public duties."

As a mere trading corporation differs materially from those ★ which are entrusted with the gov- [★ 232] ernment of cities and towns, and as such have important public duties to perform, a mandamus has been refused to compel such a mere trading corporation to produce their accounts for the purpose of declaring a dividend of the profits (*l*).

(*d*) R. *v.* Receiver for Metropolitan Police District, 4 B. & S. 593.
(*e*) *Per* Best, J., R. *v.* Fowey, 2 B. & C. 596. See also *per* Denman, C.J., R. *v.* Payn, 6 A. & E. 399.
(*f*) R. *v.* Portsmouth, 3 B. & C. 152.
(*g*) R. *v.* St. Luke's, Chelsea, 31 L. J. Q. B. 50.
(*h*) R. *v.* Wheeler, Cas. temp. Hard. 99.
(*i*) Cf. R. *v.* Stafford, 3 T. R. 646.
(*k*) R. *v.* Bank of England, 2 B. & Ald. 622.
(*l*) Id.

On the same ground a mandamus was refused to compel an insurance company to transfer shares, standing in the name of a bankrupt, into the names of his assignees (*m*).

It is not, however, necessary that the institution in connection with which the duty is to be performed should be public. It was held no objection to the granting of a mandamus to compel the performance of a duty in connection with a charity, that the institution was a private one, supported by lands left to private individuals in trust for the poor of a certain parish (*n*).

But it is an objection that the granting of a mandamus would amount to an interference with the funds of such a charity (*o*).

In some cases where the legal right of the applicant was somewhat doubtful, the Court, not wishing to determine the point on motion, granted a mandamus, in order that it might come before them on the return (*p*).

No other effective means of enforcing the right.

2. There must be no other effective lawful means of enforcing the right.

"It is well settled that where there is a remedy equally convenient beneficial and effectual, a mandamus will not be granted. This is not a rule of law, but a rule regulating the discretion of the Court in granting writs of mandamus" (*q*).

Quo warranto.—It has frequently been held a decisive answer to an application for a mandamus that there was another remedy by information in the nature of a *quo warranto* (*r*).

[★ 233] ★As to the cases in which the appropriate

(*m*) R. *v.* London Assurance Company, 1 D. & R. 510; 5 B. & A. 901.

(*n*) R. *v.* Abrahams, 4 Q. B. 157; see *per* Lord Denman, id. 160; also R. *v.* Kendall, 1 Q. B. 366, another case of a private charity; R. *v.* Worcester, 4 M. & S. 415. See also R. *v.* Ottery St. Mary Charities, 4 Q. B. 157; and the cases as to dissenting ministers, lecturers, &c., referred to *post*, pp. 279, 285.

(*o*) *Ex parte* Trustees of Rugby Charity, 9 D. & R. 214, interpreted by Denman, C.J., in 4 Q. B. 161.

(*p*) See R. *v.* Everet, Cas. temp. Hard. 261.

(*q*) *Per cur. Re* Barlow, 30 L. J. Q. B. 271.

(*r*) R. *v.* Mayor of Colchester, 2 T. R. 259; R. *v.* Bankes, 2 Burr. 1454; R. *v.* Beedle, 3 A. & E. 467; R. *v.* Mayor of Oxford, 6 A. & E. 349; R. *v.* Mayor of Winchester, 7 A. & E. 215; R. *v.* Mayor of Chester, 1 M. & S. 102; R. *v.* Atwood, 4 B. & Ad. 481; R. *v.* Derby, 7 A. & E. 419; R. *v.* Phippen, 7 A. & E. 966; *Ex parte* Mawey, 3 E. & B. 718. Contrast R. *v.* Birmingham, 7 A. & E. 254, and *Re* Barlow, 30 L. J. Q. B. 271. See, however, the case of R. *v.* Grampound, referred to *post*, p. 242, and the observations of Lawrence, J., in R. *v.* Corporation of Bedford Level, *post*, p. 242.

remedy is by *quo warranto* information rather than by mandamus, vide *ante*, p. 122 and *post*, pp. 290–293.

Action.—A mandamus has also been refused wherever the relief sought could be obtained by action.

"The Court," said Patteson, J., "will never grant a mandamus to enforce the general law of the land, which may be enforced by action" (*s*).

If a *quare impedit* does lie, said Lord Mansfield in one case (*t*), a mandamus does not. And, according to Lord Denman (*u*), the Court of Queen's Bench has never interfered by mandamus where the writ of *quare impedit* lay (*x*). On this ground the Court refused a mandamus to a bishop to license a curate of an augmented parish, where there was a cross nomination (*y*); and, for the same reason, an application was refused against the lord of a manor to compel him to present to a curacy the nominee of the majority of the inhabitants, pursuant to an agreement made on a commission of charitable uses (*z*).

★ So wherever an action on the case lay (*a*). [★ 234] On this ground a mandamus was refused to the Bank of England to transfer stock (*b*); and to a private trading corporation for the same purpose (*c*); also where the object was to try the right to the profits of a prebendal stall during his vacancy (*d*); also to compel a person to reinstate a party wall which he had pulled

(*s*) *Ex parte* Robins, 7 Dowl. 568. See also *per* Lord Denman, R. *v.* Halls, 3 A. & E. 497, and R. *v.* Ponsford, 12 L. J. Q. B. 313.

(*t*) Powell *v.* Milbank, 1 T. R. 401, n.

(*u*) R. *v.* Chapter of Exeter, 12 A. & E. 534.

(*x*) Clarke *v.* Bishop of Sarum (2 Str. 1082) is an exception. There a mandamus was granted to admit to a canonry of Sarum, notwithstanding the objection grounded on the existence of a remedy by *quare impedit*. But Lord Mansfield, C.J., and Dennison, J., in the later case of Powell *v.* Milbank (*ubi supra*), said they always thought that case wrong; and all subsequent cases have laid down the law as stated in the text. See also *per* Patteson, J., in R. *v.* Orton, 14 Q. B. 142.

(*y*) R. *v.* Bishop of Chester, 1 T. R. 396.

(*z*) R. *v.* Stafford, 3 T. R. 651. In this case Lord Kenyon, C. J., said: "It appears from the ancient roll, referred to in the affidavits, that certain proceedings had been had before the commissioners of charitable uses, respecting the lands appropriated to the maintenance of the curate; and therefore it seems as if the inhabitants have only an *equitable* right. If so, this Court cannot interfere at all; or if the inhabitants have a *legal* right, such right may be asserted in a *quare impedit*. Therefore, *quácunque viá datâ*, this rule must be discharged."

(*a*) Sabine's Case, Sid. 443. See R. *v.* Whitstable, 7 East, 353; R. *v.* Halls, 3 A. & E. 494; R. *v.* Darlington, 6 B. & S. 562.

(*b*) R. *v.* Bank of England, 2 Doug. 524.

(*c*) R. *v.* London Assurance Co., 1 D. & R. 510.

(*d*) R. *v.* Ep. Dunelm., 1 Burr. 567.

down (*e*): or when any action of tort would afford a remedy (*f*).

So where an action of trover or detinue would lie; as where the clerk to a court of requests claimed the delivery up to him of certain books belonging to his office (*g*); also where a vestry clerk claimed to have given to him the custody of the vestry book as a muniment annexed to his office (*h*).

As the right to the custody of the parish books might be decided between the old and new churchwardens on a feigned issue, a mandamus was refused to compel the old churchwardens to deliver up the books to their successors (*i*).

A mandamus was also refused where an action of debt lay, and was a not less effectual remedy than a mandamus; as to compel a railway company to pay the amount of compensation assessed (*k*). The Court had in a previous case (*l*) granted a mandamus to the company to make compensation to the proprietors of Maidenhead bridge; but (as pointed out in the judgment in the later case) the defendants had there submitted without raising the question.

A mandamus was also refused with repect to the election of a sexton, as there was a remedy by refusing to [★ 235] pay the fees of the ★ person alleged to have been wrongfully elected, or by bringing an action against him if he took them (*m*).

That an action of ejectment would lie has also been considered a sufficient reason for refusing a mandamus (*n*).

Where, however, it was a matter of doubt whether an action would lie, the Court granted a mandamus (*o*).

(*e*) R. *v.* Ponsford, 1 D. & L. 116. See also *Ex parte* Robins, 7 D. 566.

(*f*) R. *v.* Whitstable, 7 East, 353.

(*g*) R. *v.* Hopkins, 1 Q. B. 161.

(*h*) Anon., 2 Chitt. 255. As to a remedy by ejectment, see R. *v.* Stainforth Canal, 1 M. & S. 32, and R. *v.* Agardsley, 5 Dowl. 19.

(*i*) R. *v.* Street, 8 Mod. 98.

(*k*) R. *v.* Hull and Selby Railway Co., 6 Q. B. 70. This case is referred to by Hill, J. (R. *v.* Southampton, 1 B. & S. 23), as an authority for the proposition that a mandamus may be issued against a party for a matter in respect of which he is liable to an action. This is an extraordinary mistake for one to make who was himself counsel in the case.

(*l*) R. *v.* Great Western Railway Co., 6 Q. B. 72, note (*d*).

(*m*) R. *v.* Stoke Damarel, 5 A. & E. 584.

(*n*) See *per* Lee, C.J., R. *v.* Bishop of Chester, 1 Wils. 209. See also R. *v.* Agardsley, 5 Dowl. 19, and R. *v.* Stainforth Canal, 1 M. & S. 32.

(*o*) R. *v.* Nottingham Old Waterworks, 6 A. & E. 370, 372.

Petition of right.—A mandamus will be refused also where the party may proceed by petition of right (*p*). A Divisional Court, in a recent case (*q*), held that a petition of right, as depending on the fiat of the Crown, was not such a legal remedy as prevented the grant of a mandamus; but the Court of Appeal reversed this decision, Bowen, L.J., saying that the fiat of the Crown was granted, he would not say as a matter of right, but as a matter of invariable grace wherever there was a shadow of claim; it being the constitutional duty of the Attorney-General not to advise its refusal unless the claim was frivolous (*r*).

Execution.—A mandamus will be refused also where the applicant has the ordinary remedy of issuing execution on a judgment recovered (*s*); even though, under the circumstances of the case, the judgment may produce no fruits.

Where an inferior court refused to execute its own judgment of nonsuit, a mandamus was refused; because the defendants had a legal remedy by the old writ *de executione judicii* out of the Chancery (*t*).

Distress.—The existence of an effectual remedy by distress would also be a ground of refusal (*u*).

Remedy in equity.—The existence of a remedy in Equity was formerly held not to be any answer to the application of a person who had got a legal right; for, when the Court refused to grant a ★ man- [★ 236] damus because there was another specific remedy, they meant only specific remedy at law (*x*).

As the Queen's Bench Division of the High Court of Justice is now enabled to apply all those remedies which Courts of Equity could do, the existence of another specific remedy in the same court to which application for a mandamus is made will, doubtless, lead the Court to refuse the application.

Even in former times a mandamus was refused where the Court of Chancery was the more fitting tribunal for dealing with the questions involved; as where the case involved the examination of the accounts of a trading company (*y*): also where the Court

(*p*) R. *v.* Commissioners of Customs, 5 A. & E. 380.
(*q*) *Re* Nathan, L. R. 12 Q. B. D. 461.
(*r*) Id., p. 479.
(*s*) R. *v.* Victoria Park Company, 1 Q. B. 288, 291.
(*t*) Wilkins *v.* Mitchell, 3 Salk. 229.
(*u*) R. *v.* London and Blackwall Railway Co., 3 D. & L. 399. *Ex parte* Reeve, 5 D. 668; R. *v.* Margate Pier Co., 3 B. & Ald. 220;
(*x*) *Per* Buller, J., R. *v.* Stafford, 3 T. R. 652.
(*y*) R. *v.* Bank of England, 2 B. & Ald. 620; R. *v.* London As-

of Chancery, having already acted in a matter, had full power to do everything further that was necessary (*z*).

Appeal.—If, supposing the applicant has a right, there is a mode of enforcing it by appeal or writ of error, a mandamus will be refused.

Thus, where there is an appeal to the visitor or visitors (*a*) of a college or university (*b*) or cathedral (*c*); and there is no distinction in this respect between a spiritual and an eleemosynary foundation (*d*). But it is otherwise if, from any cause, the visitatorial power is suspended (*e*); or where a claim made by the person who is visitor is itself the subject-matter of the complaint (*f*).

[★ 237] ★The Court will not interfere with the decision of a visitor on any matter within his jurisdiction; provided he acts judicially, and the party accused is given a hearing (*g*). But the Court will compel him to form some judgment, though it will not oblige him to go into the merits; for it is sufficient if he decide that the appeal is too late (*h*).

A mandamus to an inn of court to admit to the degree of barrister was refused, on the ground that the ancient and usual method of redress was by appeal to the judges (*i*).

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surance Co., 1 D. & R. 510. See also *per* Lawrence, J., in R. *v.* Whitstable, 7 East, 356.

(*z*) R. *v.* Pitt, 10 A. & E. 272.

(*a*) In the case of eleemosynary private lay foundations, if no special visitor is appointed by the founder, the right of visitation is in his heirs; in default of heirs of the founder, it devolves on the sovereign, to be exercised by the great seal (R. *v.* Catherine's Hall, 4 T. R. 332; 2 Show. 170, note (*c*), and *per* Holt, C.J., in Parkinson's case, 1 Show. 74). If the foundation is ecclesiastical, and no special visitor is appointed, the right of visitation is in the bishop of the diocese (*per* Holt, C.J., 1 Show. 74, 252. See also *per curiam* in R. *v.* Blythe, 5 Mod. 404; and *per* Holt, C.J., Philips *v.* Bury, 2 T. R. 352).

(*b*) R. *v.* Apleford, 2 Keb. 861, 864; R. *v.* Patrick, 2 Keb. 65, 164, 259; Walker's case, Cas. t. Hard. 212; R. *v.* St. Catharine's Hall, 4 T. R. 233; Parkinson's case, 3 Mod. 265; Robert's case; referred to in R. *v.* Alsop, 2 Show. 170; R. *v.* Conyngham, 1 D. & R. 529. Cf. R. *v.* E. I. Co., 4 M. & S. 279.

(*c*) R. *v.* Chester, 15 Q. B. 513.

(*d*) Id. 520.

(*e*) R. *v.* Chester, 2 Str. 797; R. *v.* St. Catherine's Hall, 4 T. R. 233.

(*f*) See R. *v.* Ely, 2 T. R. 290.

(*g*) See *per* Ashurst, J., in R. *v.* Ely, 2 T. R. 336; *per* Lord Kenyon, R. *v.* Cambridge, 6 T. R. 104.

(*h*) See R. *v.* Lincoln, 2 T. R. 338, note (*a*); R. *v.* Worcester, 4 M. & S. 415; R. *v.* Hertford College, L. R. 3 Q. B. D. 693.

(*i*) R. *v.* Gray's Inn, 1 Doug. 353. See as to admission to an Inn of Court, R. *v.* Lincoln's Inn, 4 B. & C. 855. As to the case

The Court dealt similarly with an application for a mandamus to overseers to produce for inspection the warrant by which they were appointed; the objection to the appointment, grounded on want of qualification for the office, being one which could be brought on appeal to the sessions (*k*).

So where quarter sessions, after refusing to hear an appeal, granted a case for the opinion of the superior Court, which was a sufficient remedy (*l*); also where there was an appeal to quarter sessions from the refusal of a license by justices (*m*). So also in case of a refusal to insert persons on the list of ratepayers, there being a remedy by appeal (*n*).

Remedy in one's own hands.—A mandamus to compel landowners in the Bedford Level to amend and heighten certain banks within the level was refused, because the conservators within the level had, under 15 Car. 2, c. 17, s. 5, the authority of commissioners of sewers, and could enforce the doing of the repairs; so that they had the remedy in their own hands (*o*).

Where a sexton claimed a mandamus to compel the executrix ★of the late sexton to deliver up [★ 238] the keys of the church, the application was refused, as the applicant could get new keys; the keys of a church not being like an emblem or muniment of office (*p*).

A mandamus to compel overseers to furnish particulars of their accounts to the auditor was refused, on the ground that the auditor had the remedy in his own hands of disallowing all items of which particulars were not supplied (*q*).

So also where a person, by withholding the fees demanded, may compel the holder of an office to bring an action for their recovery, in which the point intended to be raised by a mandamus may be determined (*r*).

Where, however, a railway company, in the performance of a statutory duty, was constructing a railway bridge over a river, but not of the height above the

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of a proctor, where an appeal lay to the Archbishop of Canterbury, see Lee *v.* Oxenden, 3 Salk. 230.

(*k*) R. *v.* Harrison, 16 L. J. M. C. 33. See as to error, *Ex parte* Morgan, 2 Chitt. 250.

(*l*) R. *v.* West Riding, 1 A. & E. 606.

(*m*) R. *v.* Smith, L. R. 8 Q. B. 146. For the peculiar ground on which R. *v.* Dodson, 7 E. & B. 315, was decided, see *per* Lord Campbell, C.J., at p. 319.

(*n*) R. *v.* Weobly, 2 Str. 1259. Cf. Anon., 2 Barn. 426.

(*o*) R. *v.* Gamble, 11 A. & E. 69.

(*p*) Anon., 2 Chitt. 255.

(*q*) R. *v.* Halifax, 10 L. J. M. C. 81.

(*r*) R. *v.* Stoke Damarel, 5 A. & E. 584.

water required by statute, the owner of adjoining lands obtained a mandamus to compel the company to construct it of the proper height, though the act empowered him in such a case to build the bridge himself at the expense of the company (*s*); Patteson, J., saying it would be very hard if a party were confined to the remedy of pulling down the bridge and building up a new one.

Indictment.—If an indictment would adequately furnish the relief sought, a mandamus will not be granted; but when an indictment will be so regarded is not very clear from the cases (*u*).

A mandamus was refused to compel a county treasurer to pay over to the keeper of the common gaol an allowance granted to him by quarter sessions, as there was a remedy by indictment against the treasurer for his refusal to obey the order of sessions; Lord Kenyon, C.J., being further of opinion that, though the Court would compel justices to make a proper order, it would be descending too low to grant a mandamus to inferior officers to obey that order (*x*).

[★ 239] ★ Where the treasurer of a county refused to pay the expenses of a witness in a case of felony, pursuant to an order of borough sessions, under 58 Geo. 3, c. 70, the Court refused a mandamus, on the ground that there was a remedy by indictment (*y*).

On the same ground, in *R.* v. *Jeyes* (*z*), a mandamus was refused to compel the treasurer of a district to pay the expenses of a prosecution, in obedience to the order of the Court of assize under 7 Geo. 4 c. 64, s. 23.

In the last-mentioned case Lord Denman, C.J., said: "We are not to carry the remedy by mandamus so far as to issue the writ wherever an officer has neglected his duty: this Court ought not to be called upon in every case of that kind. Even if an indictment be an imperfect remedy it is some remedy: we must suppose that a respectable party, if convicted, will perform the duty; and, if he did not, the Court would take some step which would enforce it. In one respect an indictment is

(*s*) R. *v.* Norwich and Brandon Railway Co., 3 D. & L. 385.

(*u*) See R. *v.* Commissioners of Dean Enclosure, 2 M. & S. 85, and R. *v.* Severn and Wye Railway Co., 2 B. & Ald. 646, 650.

(*x*) R. *v.* Bristow, 6 T. R. 168. Contrast with this language of Lord Kenyon that of Coleridge, J., in R. *v.* Payn, cited *post*, p. 240.

(*y*) R. *v.* Surrey, 1 Chitt. 650. See R. *v.* Johnson, 4 M. & S. 515, where a county treasurer was indicted for a similar refusal; and R. *v.* Robinson, 2 Burr. 799.

(*z*) 3 A. & E. 416.

a more efficacious remedy than a mandamus; for, if a party has neglected his duty from corrupt motives (and partiality would be a corrupt motive), an indictment would not only be an indirect means of obtaining the money, but an effectual method of reaching the party who had subjected himself to the criminal proceeding" (*a*).

But in a later case, a mandamus was granted to compel a borough treasurer to pay the costs of a prosecutor and his witnesses, pursuant to an order of a judge of assize (*b*).

The defendant in *R.* v. *Jeyes* was the servant of the magistrates; and the Court refused to place itself in the situation of the magistrates to make their officer perform his duty (*c*).

If, however, both the magistrates and their officer leave a public duty unperformed, the Court will not refuse a mandamus.

Thus, where a county treasurer's accounts, having been passed by the justices, were not, as provided by 12 Geo. 2, c. 29, s. 7, deposited with the clerk of the peace, who was to keep them among the records of the county, "My only doubt," said Coleridge, J. (*d*) ★ "was whether mandamus be the proper [★ 240] remedy. The result of the cases cited appears to be merely this: that where we find a public officer, who has received an order from his masters or any competent authority, and who, upon disobeying that order will be liable to indictment, we do not proceed by mandamus: the Court leaves the case to the ordinary remedies, not because the party is too low, but because he has received an order from competent authority. Here the magistrates have issued no order, and this distinguishes the case from *R.* v. *Bristow* and *R.* v. *Jeyes*; in one in which there was an order by the magistrates, and in the other an order by the judge of assize. Then the question with me was whether the first step should have been for this Court to issue an order on the magistrates to compel them to make an order, disobedience to which might be the subject of an indictment." In the end the Court granted a mandamus to the treasurer to deposit the book of accounts.

(*a*) Id. 420.

(*b*) R. *v.* Oswestry, 12 Q. B. 239; and see R. *v.* Clark, 5 Q. B. 887.

(*c*) *Per* Lord Denman in R. *v.* Payn, 6 A. & E. 400. See also *Ex parte* Downton, 8 E. & B. 856.

(*d*) R. *v.* Payn, 6 A. & E. 401.

And if the Court sees that the ministerial officer, whose refusal to act might be punished by indictment at the hands of his superiors, is only a nominal party put forward by those superiors, a mandamus will not be refused (*e*).

Where a dock company, authorized by Act of Parliament to make and maintain a new course or channel for a river, omitted to repair certain banks which were broken down, a mandamus was granted commanding the company to repair and maintain the said banks (*f*). In answer to the objection that the company were liable to an indictment for their omission, Lord Denman delivering the judgment of the Court, said: "Those who obtain an Act of Parliament for executing great public works are bound to fulfil all the duties thereby thrown upon them, and may be called upon by this Court so to do. If this breach of contract causes a public nuisance also, that cannot dispense with the necessity of a specific performance of the obligation contracted by them" (*g*).

In an old case Holt, C.J., is reported to have said that a mandamus lay to remove a nuisance, as a bowling-green (*h*).

[★241 ★There is a class of cases in which an indictment is the only resource, viz.; where the injury to be remedied is one sustained by all the Queen's subjects in common (*i*).

Where matter can be more appropriately dealt with elsewhere.

A mandamus has also been refused where the matter was one more proper for the decision of an ecclesiastical tribunal, *e.g.*, in a case of refusal to bury a parishioner in the parish churchyard in a particular manner (*k*). If the clergymen had refused altogether to bury the corpse, the Court would have compelled him (*l*).

(*e*) R. *v.* Wood Ditton, 18 L. J. M. C. 218.

(*f*) R. *v.* Bristol Dock Co., 2 Q. B. 64.

(*g*) Id. 70.

(*h*) R. *v.* St. John's Coll., Camb., Comb. 282. In the fuller report, 4 Mod. 233, this does not appear, but it is urged in the argument, p. 237, referring to the curious case of Jacob Hall, 1 Mod. 76, who, upon complaint that he had erected a stage at Charing Cross for rope-dancing, was sent for into Court, where some of the inhabitants being present said that it did occasion broils and fightings, &c. Hale, C.J., told Hall that he understood it was a nuisance to the parish, and that in the 8th Chas. 1st, Noy came into court and prayed a writ to prohibit a bowling alley near St. Dunstan's Church, and had it.

(*i*) R. *v.* Bristol Dock Co., 12 East, 429.

(*k*) R. *v.* Coleridge, 1 Chitt. 588; *Ex parte* Blackmore, 1 B. & Ad. 122. See also R. *v.* Thetford, 5 T. R. 364. See and distinguish R. *v.* St. Margaret's, Leicester, 8 A. & E. 889.

(*l*) See *per* Bayley and Littledale, JJ., *Ex parte* Blackmore, 1 B. & Ad., 123, and *per* Abbott, C.J., R. *v.* Coleridge, 1 Chitt. 597.

A mandamus to Doctors' Commons to restore a proctor who had been removed was refused, because the matter was merely spiritual, and the Queen's Bench could not take notice of it or correct errors in the proceedings of spiritual courts, in cases where they had a proper jurisdiction: further, the deprivation being a judicial act could only be avoided by appeal (*m*).

A mandamus to compel the grant of administration to the applicant was denied, on the ground that the matter was contestable in the spiritual court, to which application should have been made (*n*).

Though the Court would, if necessary, have ordered church wardens to assemble and inquire whether a church rate should be made, it would not interfere by mandamus to compel them to make a rate; such being a matter properly of ecclesiastical cognizance (*o*).

Where matter litigated elsewhere.

Where the same question which would be raised by a mandamus was actually being litigated in another court of competent jurisdiction, the Court refused a mandamus; as in the case of an ★ application for a [★ 242] mandamus to the judge of the prerogative court of Canterbury to grant probate of a will, as to the validity of which a suit was at the time pending in the spiritual court (*p*); and in a case where a mandamus was sought to compel the granting of administration to a next of kin, where the existence or non-existence of a will was being litigated in the same court (*q*); and in a case similar to the last-mentioned, where the judgment against a will was under appeal (*r*).

But the rule on this point is not inflexible. Thus in one case the Court, induced by a variety of considerations, granted a mandamus to compel the mayor and capital burgesses (eight in number) of a corporation to fill up two vacancies caused by the death of two of the capital burgesses, though there was depending at the time a *quo warranto* information questioning the title of the mayor (*s*):—the prosecutor did not appear to be the same in both cases; the *quo warranto* proceeding might, for aught that appeared, be merely collusive, and for the purpose of delaying the proceeding by mandamus; great inconvenience might result from the num-

(*m*) Lee *v.* Oxenden, 3 Salk. 230.
(*n*) Blackborough *v.* Davis, 1 Salk. 38.
(*o*) R. *v.* St. Margarets, 4 M. & S. 250.
(*p*) R. *v.* Hay, 4 Burr. 2295. See also R. *v.* Wheeler, Cas. temp. Hard. 99.
(*q*) Anon., 5 Mod. 374.
(*r*) Steward *v.* Eddy, 7 Mod. 143.
(*s*) R. *v.* Grampound, 6 T. R. 301.

ber of capital burgesses being reduced too low; and if the mayor's title turned out to be good, then the elections ordered would be good also, whilst if it turned out otherwise the persons elected under the mandamus might disclaim (*t*).

And where a mandamus had been granted to the commissary of a consistorial court to swear in certain persons named, as church-wardens, a return that there were two causes pending before himself to try the validity of the election of the persons named was held a bad return (*u*).

Where other remedy is not so effectual.

The existence of another remedy, where that remedy is not so effectual and convenient as a mandamus, will not be a sufficient ground for refusing the mandamus (*x*).

[★ 243] ★ Thus where a railway had been laid down in pursuance of an Act of Parliament which provided that the public should have the beneficial enjoyment of it, and the railway company afterwards took it up, the Court (in *R. v. Severn and Wye Railway Co.* (*y*)) granted a mandamus to reinstate and lay down the railway again. Abbott, C. J., said: "I have entertained considerable doubts during the discussion whether the Court ought to grant a mandamus to compel the doing of an act, the omission to do which may be prosecuted by indictment. I am not, however, satisfied by the authorities cited in the course of the argument, that there is no reasonable ground for that doubt. If an indictment had been a remedy equally convenient, beneficial and effectual as a mandamus, I should have been of opinion that we ought not to grant the mandamus; but I think it is perfectly clear that an indictment is not such a remedy; for a corporation cannot be compelled by indictment to reinstate the road. The Court

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(*t*) And in R. *v.* Corporation of Bedford Level, 6 East, 367, Lawrence, J., said: "I do not know that it is a universal rule that where such an information [*quo warranto*] lies, the Court will in no case grant a mandamus. There may, I conceive, be occasions where the latter might be deemed the more proper remedy."

(*u*) R. *v.* Harris, 3 Burr. 1420.

(*x*) Some cases were referred to, *arguendo*, in R. *v.* Bishop of Chester (1 T. R. 399), in which the Court granted a mandamus though the party had another special legal remedy, such as an assize for office; but, as observed by Buller, J. (p. 404), that remedy had become obsolete, and the offices were in general created by letters patent; and it was peculiarly the duty of the Court of Queen's Bench to see that the powers created by the king's charters were properly exercised.

(*y*) 2 B. & Ald. 646. See R. *v.* Rathmines Commissioners, 16 Ir. C. L. Rep. (N. S.) 532.

may, indeed, in case of conviction, impose a fine, and that fine may be levied by distress; but the corporation may submit to the payment of the fine and refuse to reinstate the road; and at all events a considerable delay may take place" (*z*).

A similar opinion had previously been expressed by Lord Ellenborough in *R.* v. *Commissioners of Dean Enclosure* (*a*), on an application to compel the Commissioners to obey an order of sessions to set out a road as a public road.

But it seems that this doctrine will not be extended. "I believe," said Lord Denman, C.J., in a later case (*b*), "it is generally thought ★ that the decision [★ 244] in *R.* v. *The Severn and Wye Railway Co.* went quite far enough."

According to the same learned judge, in another case (*c*), the doctrine will only apply where the other remedy is not *in its nature* so complete as a mandamus, without reference to any circumstances peculiar to the case in which it is to be applied. Therefore a mandamus was refused to compel a company, which appeared to have no assets, to pay the amount of debt and costs recovered against it in an action. "For this," said Lord Denman, C.J., "an execution by *fi. fa.* is a perfect remedy in its nature; and, if we were to issue the writ because in this particular case there are no corporation chattels seizable, it would be difficult on principle to refuse to issue it in any case where the sheriff should return *nulla bona*, whether the writ had issued against a corporation or an individual; for in principle there is no distinction between the two" (*d*).

However, where the Court of Arches had wrongfully refused to entertain an appeal from a sentence by the bishop under the Church Discipline Act, 3 & 4 Vict. c. 86, the Court issued a mandamus to the judge of that Court, notwithstanding that an appeal from his refusal lay to the Privy Council; as the Privy Council would

(*z*) 2 B. & Ald., 650. Cf. the answer given by Lord Denman, C.J., in R. *v.* Eastern Counties Railway Co., 10 A. & E. 565, 566, to the objection that the prosecutor had a remedy by indictment for disobedience to an Act of Parliament: "This argument appears to prove too much; as it would prevent the Court from acting in all cases where an Act of Parliament is contravened. Besides, the indictment does not compel the performance, but only punishes the neglect of duty." See also R. *v.* Nottingham Old Water Works, 6 A & E. 355.

(*a*) 2 M. & S. 85.

(*b*) R. *v.* Gamble, 11 A. & E. 72.

(*c*) R. *v.* Victoria Park Co., 1 Q. B. 291.

(*d*) Ib.

not remit the case to the Arches Court, but decide it itself as a court of appeal, and so the appellant would lose the benefit which the Legislature intended he should enjoy by the intermediate appeal to the Arches Court (*e*).

Cumulative remedy.

The existence of another remedy is sometimes regarded as merely cumulative, in which case it will be no bar to the granting of a mandamus, *e.g.*, where a statute gave a right to parishioners to inspect the accounts of the churchwardens and overseers of the poor, and imposed a penalty for wrongfully refusing inspection (*f*).

The existence of a right to pull down an accommodation work which a railway company was not erecting in the manner required by Act of Parliament, and to erect a proper one at the expense of the company, was not considered a sufficient ground for refusing a mandamus to the company (*g*).

Where other remedy would operate harshly.

[★245] ★ The Court has also sometimes granted a mandamus to compel the performance of a duty, which could be efficiently enforced by another method, where that other method would operate harshly or punish the innocent equally with the guilty.

On this ground a mandamus was granted to compel the warden and fellows of a college at Oxford to affix the common seal of the college to the answer of the principal officers of the college to a bill filed in Chancery against the warden, fellows, and scholars; the mode of compulsion in Chancery then being by sequestration of the whole property of the college; a mode of proceeding that would punish the corporation at large, when only a part of it was in fault (*h*).

Where mandamus unnecessary.

But if there be any other unobjectionable mode of effectually enforcing the legal right, a mandamus will not be granted.

For this reason a mandamus will not be granted to enforce a judgment of an inferior tribunal, which that tribunal can itself enforce (*i*).

On the same ground the Court has refused a mandamus to compel an inferior ministerial officer to perform a duty connected with his office, where he is subordi-

(*e*) R. *v.* Dodson, 7 E. & B. 319.

(*f*) R. *v.* Clear, 7 D & R. 393; 4 B. & C. 899. See also R. *v.* Everet, Cas. temp. Hard. 261.

(*g*) R. *v.* Norwich Railway Co., 3 D. & L. 385.

(*h*) R. *v.* Windham, 1 Cowp. 377. A mandamus has also been refused where it would operate harshly. See R. *v.* Paddington, 9 B. & C. 460.

(*i*) See Dr. Walker's case, Cas. temp. Hard. 212.

nate to some other authority which has power to compel performance and to punish for neglect or refusal. Thus it was refused in the case of a county treasurer, to compel him to pay money in obedience to an order of quarter sessions (*k*).

In one case a mandamus was refused to compel the lord of a manor to admit a copyholder who claimed by descent, as the applicant had as complete a title without admittance as with it against all the world but the lord (*l*); but in later cases mandamuses have frequently been granted for this purpose (*m*).

Where a town council had wrongfully removed an alderman and ★ at their next meeting formally rescinded their previous resolution, a mandamus to restore him was refused, as there remained no substantial wrong to remedy (*n*). [★ 246]

3. The Court will not grant a mandamus unless convinced that it will be practically effective to secure the object aimed at (*o*).

Mandamus must be practically effective to secure the object aimed at.

In *R.* v. *Bishop of London* (*p*) one ground of refusing a mandamus to compel the bishop to licence a lecturer in a parish church was, that it would have been nugatory to grant it, the lecturer not having obtained the consent of the rector, who had a right to refuse the use of the pulpit notwithstanding any licence the bishop might grant (*q*).

Where by a rule of a savings' bank no deposit could be claimed after the expiration of seven years from the death of the depositor, the Court refused a mandamus to compel the trustees, after the lapse of that period, to refer a dispute to arbitration, as the inquiry could have no practical result (*r*).

Though in a proper case a mandamus might issue to compel quarter sessions to state a case, yet if the case when stated would come to nothing a mandamus will be refused; *e.g.*, where the only case which would have been

(*k*) R. *v.* Bristow, 6 T. R. 168 ; R. *v.* Surrey, 2 Chitt. 650, approved in R. *v.* Jeyes, 3 A. & E. 416. See and distinguish R. *v.* Payn, 6 A. & E. 392, 400. See the observations of the Court in Leigh's case, 3 Mod. 335 ; also Morley *v.* Stacker, 6 Mod. 83. But see now the case of R. *v.* Oswestry, referred to *ante*, p. 239.

(*l*) R. *v.* Rennett, 2 T. R. 197.

(*m*) *Vide post*, pp. 299, 300.

(*n*) R. *v.* Ryde, 28 L. T. (N.S.) 629.

(*o*) See *per* Eyre, J., R. *v.* Heathcote, 10 Mod. 55.

(*p*) 1 Wils. 11.

(*q*) See also R. *v.* Bishop of Exeter, 2 East, 461, and *per* Lawrence, J., at p. 466.

(*r*) R. *v.* Northwich Bank, 9 A. & E., 729. See also R. *v.* Sillifant, 5 N. & M. 640.

signed was one which would have excluded the point of law relied on by the party demanding the case (*s*).

So where it was sought to put petty sessions in motion in a case where the applicant could not in the result have succeeded; "Ought we to grant the mandamus," asked Lord Denman, "if we see that the party will ultimately fail?" (*t*).

Where a return by commissioners of sewers to a mandamus to make a rate, shewed that there was not sufficient time to make the rate, owing to the expiration of the commission a few days after the mandamus had been served on them, the Court refused to grant a peremptory mandamus, as there was no power in anybody to execute it (*u*).

[★ 247] ★ So where a corporate officer was removed in an informal manner the Court, in the exercise of its discretion, refused a peremptory mandamus, the only effect of which would be to compel the corporation to restore an officer whom (under the circumstances of the case) they might immediately remove in a more formal manner (*x*).

Where a mandamus to compel obedience to an order of the Board of Trade, directing a railway company to make a bridge for carrying a turnpike road over their line, was asked for against a company without funds, which had exhausted all its powers of raising money in making the line, and (the undertaking proving a failure) had leased it in perpetuity to another company who took all the profits of the line, the Court refused a mandamus which, under the circumstances, there were no means of enforcing (*y*).

A mandamus to a railway company to complete their line had been refused in a previous case, where the powers conferred by the Act had expired before the writ of mandamus was applied for, and where, consequently, the company was no longer able to do what was asked for (*z*).

Mere inability to obey the writ has not, however, been in all cases considered a sufficient reason for refusing it. "We have had frequent occasion to observe," said Lord Denman, C. J., in one case (*a*), "that we consider such

(*s*) R. *v.* Pembrokeshire, 2 B. & Ad. 391.
(*t*) R. *v.* Bateman, 4 B. & Ad. 553.
(*u*) R. *v.* Commissioners of Sewers, 2 Str. 763.
(*x*) R *v.* Griffiths, 5 B. & Ald. 731; R. *v.* Axbridge, 2 Cowp. 523; R. *v.* Mayor, &c., of London, 2 T. R. 177.
(*y*) *Re* Bristol, &c., Railway Co., L. R. 3 Q. B. D. 10.
(*z*) R. *v.* London and North Western Railway Co., 6 Ry. Cas. 634.
(*a*) R. *v.* Birmingham, &c., Co., 2 Q. B. 61.

an excuse inadmissible." But, in this case (as pointed out by Lord Campbell in a later one (*b*)), the notice to do the act had been given as early as possible, and the act to be done was merely to restore a turnpike road to its former width, which apparently required no purchase of land either voluntarily or compulsorily.

If it is not clear that the writ will be inoperative, it will not be refused in a proper case (*c*).

Demand and refusal.

4. The Court, before it will grant a mandamus, must be convinced that there has been a demand made, by a party having a right to make it, for the performance of the duty sought to be enforced, and ★ a re- [★ 248] fusal to perform it by the party against whom the application is made (*d*).

And where the duty may be performed by either of two individuals, it must be shewn that there has been a refusal on the part of each (*e*).

The parties entitled to have works done, or done in a particular manner by a railway or other company under their Act, ought, before applying for a mandamus, to point out the particulars in which the Act has not been complied with, and claim performance; and a complaint made during the progress of the works will not relieve from the necessity of specifically demanding a proper compliance with the statute, after the work is completed (*f*).

Where a railroad company, on being called on to perform certain duties imposed by statute, wrote by their solicitors expressing a willingness to do some of them, but, as to the rest, stating that they were instructed to accept service of any process which might be brought against them, this was considered by Patteson, J., a sufficient refusal as to the latter (*g*).

But where the company answered a like application by requiring an indemnity before they would do the works, this was considered not to be such a refusal as to furnish ground for a mandamus : the answer of the company should have been followed by a direct applica-

(*b*) R. *v.* London and North Western Railway Co., *ubi supra.*
(*c*) See R. *v.* Bridgman, 15 L. J. M. C. 44.
(*d*) See *Anon.*, Lofft, 148; R. *v.* Bristol Railway Co., 4 Q. B. 162; R. *v.* Frost, 8 A. & E. 822; R. *v.* Brecknock Canal Navigation, 3 A. & E. 217; R. *v.* Stoke Damarel, 5 A. & E. 584; R. *v.* Wilts and Berks Canal Navigation, 3 A. & E. 477; R. *v.* Priors Ditton Inclosure Commissioners, 4 Jur. 193; R. *v.* Trustees of Cheadle Highway, 7 Jur. 373; *Ex parte* Winfield, 3 A. & E. 614.
(*e*) R. *v.* Bishop of London, 13 East, 419.
(*f*) R. *v.* Bristol Railway Co., 4 Q. B. 170–172,
(*g*) R. *v.* Norwich, &c., Railway Co., 3 D. & L. 385.

tion, or a request for a direct answer, with an intimation that their declining to give it would be considered a refusal (*h*).

"It is not, indeed," as observed by Lord Denman (*i*), "necessary that the word 'refuse,' or any equivalent to it, should be used; but there should be enough to shew that the party withholds compliance, and distinctly determines not to do what is required. The question is, as in a case lately before us respecting payment [★ 249] of ★ taxes (*R.* v. *Ford*, 2 A. & E. 588), whether the party had done what the Court distinctly sees to be equivalent to a refusal" (*k*).

Where inspection of the books of accounts of road trustees was offered as a matter of favour and not of right, Lord Denman doubted whether there could be said to have been a refusal: if it were important to assert the right, the person applying might have said that he accepted the liberty of inspection as a right, not as a favour; and if upon that the books had been withheld, a mandamus might be applied for (*l*).

There may be a substantial refusal, though the demand should also embrace, in the alternative something else which cannot rightly be demanded, where such alternative may be rejected (*m*).

Whether there has been a refusal or not is to be collected from the facts of each particular case. "No rule," says Lord Denman, "can be laid down for determining whether there has been a refusal or not; it is a waste of time to cite former decisions on the subject, as if the want of some one circumstance which existed in a former case would decide this" (*n*).

It has been said, in an Irish case (*o*), and with reason, that the demand should disclose a *primâ facie* title on the part of the person making it, which should be reasonably vouched.

The American law makes a distinction between duties

(*h*) R. *v.* Brecknock Canal Co., 3 A & E. 223.

(*i*) Id. 222.

(*k*) See also R. *v.* Wilts Canal Co., 8 Dowl. 623; R. *v.* Archdeacon of Middlesex, 3 A. & E. 615; R. *v.* Hackney District, L. R. 8 Q. B. 528.

(*l*) R. *v.* Northleach Roads, 5 B. & Ad. 982.

(*m*) R. *v.* St. Margaret's, Leicester, 8 A. & E. 889.

(*n*) R. *v.* Conservators of Thames and Isis, 8 A. & E. 904; cf. R. *v.* Hertford College, L. R. 3 Q. B. D. 693; R. *v.* East India Co., 4 B. & Ad. 530; R. *v.* Archdeacon of Middlesex, 3 A. & E. 617; R. *v.* Birmingham Canal Co., 2 W. & Bl. 708; cf. Irving *v.* Askew, 20 L. T. N. S. 584; and *per* Blackburn, J., R. *v.* Allen, L. R. 8 Q. B. 76.

(*o*) R. *v.* Inspectors of Irish Fisheries, 10 Ir. R. C. L. 215.

of a private nature and those which affect the public at large. In the former class of cases a demand and refusal are a condition precedent to relief by mandamus. In cases of the latter kind, there being no one specially empowered to demand performance of the duty, a literal demand and refusal are unnecessary; the law itself standing in lieu of a demand, and the omission to perform the required duty in place of a refusal (*p*).

★ 5. A mandamus is always granted to compel the performance of some duty which has not been done. It never had the effect of the old writ *de non molestando* (*q*). [★ 250]

Granted only to compel the doing of something.

It is not granted to undo an act already done. The Court will not allow the validity of the act done to be tried in this way. "We grant it," said Lord Campbell, "when that has not been done which a statute orders to be done; but not for the purpose of undoing what has been done" (*r*).

On this ground a mandamus was refused to compel a company to take off the company's seal from the register of shareholders (*s*).

The Court has always refused to allow an application for a mandamus to be made the occasion or excuse for obtaining the opinion of the Court on some doubtful question of law.

In a case (*t*) where the object of the application was to get the Court to construe a section of an Act of Parliament, the argument was stopped, Lord Denman, C.J., saying: "It now appears that there is no question at present *bonâ fide* in contest between these parties. When there is a doubt as to the mode of proceeding under an Act of Parliament, the parties must act on their own responsibility, and not come and ask advice from the Court, which is not bound to give them directions, before a matter is properly ripe for a judicial determination. On this ground the Court must now decline giving any opinion on the Act."

6. The application for a mandamus must be made in proper time.

Effect of delay in applying for mandamus.

(*p*) See High's Extraordinary Remedies, pp. 17, 18, and the cases there cited.

(*q*) *Per cur.* Peat's case, 6 Mod. 229. In a case, temp. Car. 2, the Archdeacon of Rochester obtained a mandamus to exempt him from being expenditor to commissioners of sewers, being a secular office and inferior to his degree, Lee or Warner's case, 2 Keb. 693.

(*r*) *Ex parte* Nash, 15 Q. B. 95.

(*s*) Ib.

(*t*) R. *v.* Blackwell Railway, 9 Dowl. 558.

The Court will refuse a mandamus where there has been unreasonable delay in applying for it.

On this ground a mandamus was refused to compel a canal company to enrol, as required by their Act, the contracts, &c., relating to land compulsorily taken from the applicant, where it appeared that the company had been in undisturbed possession of the land in question for sixty-five years (*u*).

An application, in 1813, to compel a canal company [★ 251] to proceed ★ to an assessment of the value of land taken by them in 1799 was also held too late (*x*).

An application against a railway company, to compel completion of their line, was held too late after the powers given by their Act had expired (*y*).

The Court dealt in like fashion with an application against road trustees to make a new piece of road in obedience to a local Act, where the application was made twelve years after the passing of the Act and seven years after the expiration of compulsory powers; the trustees having done nothing whatever in execution of the powers conferred (*z*).

Application premature.

The application may also be made too soon: *e.g.*, when made against a railway company to compel them to assess compensation for injury to land, where their works are not yet complete, and the whole injury likely to be caused may not yet have been done (*a*).

An application for a mandamus to proceed to a new election, after judgment of ouster, was held to be made too soon where the judgment of ouster had not actually been signed (*b*).

Motives.

7. The Court must be satisfied as to the motives of the applicant for a mandamus.

Though the applicant may have a strict legal right, the Court will not use its discretionary power for the purpose of enabling him to assert it, when not convinced of the propriety of his motives.

The purchaser of certain shares in an abandoned

(*u*) R. *v.* Leeds to Liverpool Navigation 11 A. & E. 316.

(*x*) R. *v.* Stainforth and Keadby Canal Co., 1 M. & S. 32. See also R. *v.* Cockermouth Commissioners, 1 B. & Ad. 378.

(*y*) R. *v.* London and North Western Railway Co., 6 Ry. Cas. 634.

(*z*) R. *v.* Rochdale and Halifax Road Trustees, 12 Q. B. 448. See also R. *v.* Lancashire, 12 East, 366; R. *v.* Fowey, 2 B. & C. 593; *Ex parte* Scott, 8 Dowl. 328; see and distinguish R. *v.* Deptford Pier Co., 8 A. & E. 910.

(*a*) *Ex parte* Parkes, 9 Dowl. 614. See also R. *v.* Paddington Vestry, 9 B. & C. 461.

(*b*) R. *v.* West Looe, Burr. 1386.

railway company was refused a mandamus to compel the registration of transfer, where it appeared that he was not proceeding *bonâ fide* for the purpose of becoming a shareholder, and that he had no public interest in the concern before he became a shareholder (*c*).

(*c*) R. *v.* Liverpool, &c., Railway Co., 21 L. J. Q. B. 284.

[★ 252] ★ CHAPTER III.

NATURE OF THE DUTIES ENFORCEABLE BY MANDAMUS.

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General rule.

THE general rule applicable to the granting of a mandamus was stated in an early case (*a*) by Lord Mansfield as follows: "Where there is a right to execute an office, perform a service, or exercise a franchise (more especially if it be in a matter of public concern, or attended with profit), and a person is kept out of possession, or dispossessed of such right, and has no other specific legal remedy, this Court ought to assist by a mandamus. . . . The value of the matter or the degree of its importance to the public policy is not scrupulously weighed. If there be a right and no other specific remedy, this should not be denied" (*b*).

Imperious duty.

The public duty enforceable by mandamus, is, in the language of Abbott, C J. (*c*), "an imperious duty;" *i.e.*, one as to which no liberty of choice, as to the performance or non-performance of it, is left with the officer or tribunal that has to discharge it.

[★ 253] ★ Where the words of a bye-law of a corporation were that "it shall and may be lawful" for the corporation to admit to an office, it was held that no

(*a*) R. *v.* Barker, 3 Burr. 1266, 1267.
(*b*) See also R. *v.* Cambridge, 3 Burr. 1659.
(*c*) R. *v.* Fowey, 2 B. & C. 591; 4 D. & R. 132.

duty was imposed which could be enforced by mandamus (*d*). And the same was held where like words were used in an Inclosure Act (*e*). Also where similar words empowered justices to issue a distress warrant under certain circumstances (*f*), and a bishop to issue a commission of inquiry under the Church Discipline Act of 3 & 4 Vict. c. 86 (*g*). So also with respect to an Act providing that "it shall and may be lawful" for quarter sessions to order bridges or roads to be widened and improved (*h*).

The same was held with reference to sect. 28 of 41 & 42 Vict. c. 77, which provides that "the mayor, aldermen and commons in the city of London, and the Metropolitan Board of Works in the metropolis exclusive of the city of London, and the council of any borough which has a separate Court of quarter sessions, and the county authority of any county *may*, on the application of the owner of any locomotive exceeding nine feet in width or fourteen tons in weight, *authorize* such locomotive to be used on any turnpike road or highway, &c." (*i*).

Where the obligatory duty is to do either of two things, a mandamus will not be granted to compel the doing of one of them unless it can be shewn that the other cannot be done (*k*).

As to the distinction between a power given by statute to do a particular work and a command to execute it, see *R.* v. *Birmingham Canal Navigation* (*l*).

Wherever sessions have a discretion and exercise it in a matter properly belonging to their jurisdiction, it is an invariable rule that the High Court will not interfere (*m*).

So as to the exercise of a discretion vested in any other person or body (*n*).

★ The duty of a vestry under the Metro- [★ 254] politan Local Management Act to make, without unreasonable delay, the requisite sewers and drainage works is imperative (on the approval of the Metropolitan Board of Works being obtained); but they have a dis-

(*d*) R. *v.* Eye, 1 B. & C. 85; R. *v.* West Looe, 5 D. & R. 414.
(*e*) R. *v.* Flockwold, 2 Chitt. 251.
(*f*) R. *v.* Hughes, 3 A. & E. 425.
(*g*) R. *v.* Bishop of Chichester, 2 E. & E. 209.
(*h*) *Re* Newport Bridge, 2 E. & E. 377.
(*i*) In the matter of an Application, &c., Times, 28 April, 1887.
(*k*) R. *v.* South Eastern Railway Co., 4 H. L. Cas. 471.
(*l*) 2 W. Bl. 708; and see *Re* Heward, 2 D. & L. 753; 14 L.J. Q. B. 113.
(*m*) See *per* Bayley, J., R. *v.* Norfolk, 1 D. & R. 74.
(*n*) See R. *v.* Kensington, 12 Q. B. 654.

cretion as to where the works shall first be commenced, having regard to the previous exigencies of particular districts, and no one district is entitled to a mandamus which would deprive the vestry of such discretion (*o*).

Where by the charter of a borough the mayor and aldermen were to elect such and so many free burgesses as they should think fit, it was considered not competent to the Court to grant a mandamus directing them to elect any (*p*).

So where the words of a charter with reference to the election of aldermen and common council were "*eligere possint*," the Court refused a mandamus (*q*).

But the fact that the words of an Act of Parliament are permissive only will not prevent a mandamus being sometimes granted.

And mandamuses have been granted in many cases where words of permission only were found in the charters, *e.g.*, to hold a local court for the determination of civil suits, such being for the public benefit (*r*).

Meaning in statutes in permissive words.

It has, indeed, been said (*s*) to have become an axiom that "in public statutes words only directory, permissory or enabling, may have a compulsory force, where the thing to be done is for the public benefit or in advancement of public justice."

A judgment of the Queen's Bench Division delivered by Cockburn, C.J. (*t*), went further and laid it down as an established rule that where a statute authorizes the doing of a thing for the sake of justice or the public good, the word "may" means "shall."

[★255] ★ But the rule as thus stated was, in the same case, unanimously condemned by all the members of our highest appellate tribunal (*u*); from whose judgments the following extracts are taken:—

Lord Cairns, C., said: "The words 'it shall be lawful' are not equivocal. They are plain and unambiguous. They are words merely making that legal and possible which there would otherwise be no right or

(*o*) R. *v.* St. Luke's Chelsea, 31 L. J. Q. B. 50.

(*p*) See *per* Holroyd, J., R. *v.* Fowey, 2 B. & C. 594.

(*q*) R. *v.* Chester, 1 M. & S. 101. There was also in this case a long-continued usage opposed to the application.

(*r*) R. *v.* Havering-atte-Bower, 5 B. & A. 691; R. *v.* Mayor, &c., of Wells, 4 D. 562; R. *v.* Mayor, &c., of Hastings, 1 D. & R. 148; R. *v.* Bailiffs, &c., of Eye, 2 D. & R. 175; R. *v.* Bailiffs, &c., of Ilchester, 2 D. & R. 724.

(*s*) *Per* Coleridge, J., R. *v.* Tithe Commissioners, 14 Q. B. 474. "To the rule thus guardedly expressed there is not, perhaps, much to object" (*per* Lord Cairns, C., L. R. 5 App. Cas. 225).

(*t*) R. *v.* Bishop of Oxford, L. R. 4 Q. B. D. 258.

(*u*) Julius *v.* Bishop of Oxford, L. R. 5 App. Cas. 214.

authority to do. They confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so. Whether the power is one coupled with a duty such as I have described is a question which, according to our system of law, speaking generally, it falls to the Court of Queen's Bench to decide, on an application for a mandamus. And the words, 'it shall be lawful,' being, according to their natural meaning, permissive or enabling words only, it lies upon those, as it seems to me, who contend that an obligation exists to exercise this power, to shew, in the circumstances of the case, something which, according to the principles I have mentioned, creates this obligation" (*x*). After referring to the cases of *Alderman Blackwell* (*y*), *R.* v. *Barlow* (*z*), *R.* v. *Havering-atte-Bower* (*a*), *Macdougall* v. *Patterson* (*b*), *Morisse* v. *Royal British Bank* (*c*), and *R.* v. *Tithe Commissioners* (*d*), Lord Cairns added: "The cases to which I have referred appear to decide nothing more ★ than this, that where a power is deposited [★ 256] with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised" (*e*).

(*x*) Id. 222, 223.

(*y*) 1 Vern. 152; where the words of the statute being that the Chancellor "may grant a commission" of bankruptcy, Lord Keeper North held that he was bound to exercise the power for the benefit of creditors.

(*z*) 2 Salk. 609; an indictment on 14 Car. 2, c. 12, against churchwardens for not making a rate to reimburse constables.

(*a*) 5 B. & Ald. 691.

(*b*) 11 C. B. 755; a case as to the allowance of costs to a successful plaintiff in a county court.

(*c*) 1 C. B. N. S. 67; as to the right of a judgment creditor of a joint stock bank to execution against a shareholder.

(*d*) 14 Q. B. 459; as to confirmation by the Tithe Commissioners of agreements for commutation of tithe.

(*e*) L. R. 5 App. Cas. 225.

Lord Penzance, if the matter were to be decided by previous definitions, would have preferred to the so-called axiom above-mentioned, what was said by Jervis, C. J., in *R.* v. *York and North Midland Railway Co.* (*f*), that words such as "it shall be lawful" were to be understood as permissive only unless some "absurdity or injustice" would follow from giving them their natural meaning (*g*).

Lord Selborne added his opinion that the meaning of such words is the same whether there is or is not a duty or obligation to use the power which they confer, and "they are potential, and never in themselves significant of any obligation. The question whether a judge or a public officer to whom a power is given by such words is bound to use it upon any particular occasion, or in any particular manner, must be solved *aliunde;* and in general it is to be solved from the context, from the particular provisions, or from the general scope and object of the enactment conferring the power" (*h*).

Difference between judicial and ministerial duty.

In compelling the performance of a public duty by an inferior office or tribunal the Court will consider carefully whether the duty is of a judicial or of a merely ministerial character.

If the duty be of a judicial character a mandamus will be granted only where there is a refusal to perform it in any way; not where it is done in one way rather than another, erroneously instead of properly. In other words, the Court will only insist that the person who is the judge shall act as such; but it will not dictate in any way what his judgment should be.

If, however, the public act to be performed is of a purely ministerial kind, the Court will by mandamus compel the specific act to be done in the manner which to it seems lawful.

The distinction is clearly put by Lord Hardwicke in [★257] dealing ★ with an application for a mandamus to a bishop to grant a licence to a person elected usher of a free grammar school:—"If the bishop here acts judicially, a mandamus lies not to compel him to grant a license, but only to determine the one way or the other; as we often grant them to give sentence, generally, without directing them what sentence to give; so to give judgment in inferior Courts. But if he acts ministerially, and it appears to us that the person applying for the mandamus is qualified for the office

(*f*) 1 E. & B. 861. (*g*) L. R. 5 App. Cas. 230.
(*h*) Id. 235. See also the judgment of Lord Blackburn, p. 241.

he prays to be admitted to, then a mandamus goes requiring his admission" (*i*).

The opinion of the Court of Chancery that the duty was ministerial only would not induce the Court of Queen's Bench to grant a mandamus, where it considered the duty judicial (*k*).

The Court will not by mandamus order quarter sessions to quash a rate; for quashing a rate is a judicial act, and the Court will not by mandamus dictate the judgment which another Court shall give (*l*); nor will it interfere with any exercise of a discretion vested in the inferior tribunal, as, for example, in acceding to or refusing an application for postponement (*m*).

So where a magistrate has heard a case and exercised his discretion in either convicting or acquitting, the Court will not by mandamus compel him to rehear the case, or to return the proceedings which had taken place before him (*n*).

So also with regard to an exercise of discretion in disallowing a certain charge of a coroner (*o*).

How far decision of inferior tribunal will be compelled by mandamus.

If any duly constituted tribunal is the proper judge of the matter in question, the High Court of Justice will not interfere by mandamus; except, as already stated, so far as may be necessary to put that tribunal in motion.

If, however, there has been on the part of the proper tribunal ★ what, in the opinion of the Court, [★ 258] amounts to a refusal to act, a mandamus to compel it to do so will be granted, even in the case of private charities (*p*).

A good illustration of this distinction is afforded by the case of *R.* v. *The Deputies of the Freemen of Leicester* (*q*), where the election of two deputies A. and B., being disputed, the four days' notice required by statute was served on A.'s wife; and evidence was given of its

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(*i*) R. *v.* Bishop of Lichfield, 7 Mod. 218; cf. *per* Lord Ellenborough in R. *v.* Archbishop of Canterbury, 15 East, 139; *per* Best, J., in R. *v.* North Riding of Yorkshire, 2 B. & C. 291; and *per* Littledale, J., R. *v.* Middlesex, 9 A. & E. 546. See also R. *v.* Lincoln, 2 T. R. 338, note (*a*).

(*k*) See *Ex parte* Cook, 2 E. & E. 586; R. *v.* Law, 7 E. & B. 366.

(*l*) See *per* Littledale and Coleridge, JJ., in R. *v.* Middlesex, 9 Ad. & E. 546.

(*m*) *Ex parte* Becke, 3 B. & Ad. 704; See also R. *v.* Norfolk, 1 D. & R. 74; R. *v.* Monmouthshire, 1 B. & Ad. 895; 3 Dowl. 306.

(*n*) *Ex parte* B. & F. Patent Invention Co., 7 Dowl. 614.

(*o*) R. *v.* Justices of Kent, 11 East, 229.

(*p*) See R. *v.* Bishop of Worcester, 4 M. & S. 415; R. *v.* Lincoln, 2 T. R. 338, n. As to refusal, *vide ante*, pp. 248, 249.

(*q*) 15 Q. B. 671.

having been served personally on B. The deputies, who were the legal tribunal to determine the validity of the election, having erroneously decided that the service on A. should have been personal, and having also held as a fact on the evidence that there had not been personal service on B., refused to inquire into either election. The Court held that, as regarded A.'s case, there had been a refusal to exercise jurisdiction, and a mandamus to compel the deputies to exercise it was granted; but that, as regarded B.'s case, the deputies had exercised their jurisdiction, and a mandamus was refused.

Though the High Court may refer it to an inferior court to consider what judgment it should pronounce, it will not dictate by mandamus the judgment which the inferior court should give (*r*). The Court may send a mandamus to an inferior court to do its duty in general terms, but not to do a particular thing (*s*). A mandamus to sessions to hear and enter continuances is of the former kind, and is granted where the sessions have declined to hear at all; it is not granted for the purpose of prescribing to them in what manner they shall direct their inquiry (*t*).

The same is true of the visitor of a college: all the High Court can do is to put the visitor in motion; having done so it cannot review his decision (*u*), provided, that is, he has acted within his jurisdiction (*x*), and the accused party has had an opportunity of [★ 259] ★ being heard (*y*). But it will, if necessary, compel the visitor to hear and determine an appeal which properly lies to him (*z*).

The High Court will not dictate the method of procedure to be pursued by the inferior court, or the form in which evidence is to be given (*a*); provided the essentials of justice are complied with, and a man has not been condemned without an opportunity afforded him of being heard either in person or by counsel (*b*).

But the ordinary tribunal may sometimes become in-

(*r*) *Per* Littledale, J., R. *v.* Middlesex, 9 A. E. 546.
(*s*) *Per* Patteson, J., R. *v.* Hewes, 3. A. & E. 732; cf. R. *v.* Lincoln, 2 T. R. 338, note (*a*).
(*t*) *Per* Williams, J., 3 A. & E. 732.
(*u*) *Per* Coleridge, J., *Ex parte* Buller, 1 Jur. N. S. 709. See the judgment of Holt, C. J., in Phillips *v.* Bury, 2 T. R. 351 *et seq.*; R. *v.* Chester, 1 Wils. 206.
(*x*) See *per* Ashurst, J., R. *v.* Bishop of Ely, 2 T. R. 336.
(*y*) *Per* Lord Kenyon, R. *v.* Cambridge, 6 T. R. 104.
(*z*) R. *v.* Worcester, 4 M. & S. 415.
(*a*) R. *v.* Ely, 5 T. R. 475.
(*b*) R. *v.* Archbishop of Canterbury, 1 E. & E. 545.

capacitated to deal with the matter; as where the principle applies that no one can be a judge in his own cause.

Where existence of a visitor will not prevent grant of mandamus.

In a case of this kind a visitor cannot be such judge, unless the founder expressly makes him so. Where a bishop who was visitor of a college claimed a right, on a vacancy of its mastership, to appoint not, as provided by the statutes of the college, one of the two persons presented to him by the fellows, but a third person nominated by himself, a mandamus was granted to compel him to appoint one of the two presented by the fellows (*c*). The existence of a visitor was held, under the circumstances of the case, to be no objection to the granting of the mandamus; as the visitor had an interest and asserted a right, which was the very matter complained of.

So where the visitor (a bishop) was also the head of a college, a mandamus to admit a chaplain was directed to him; as, the two offices being in the same person, the visitatorial power must be considered as temporarily suspended (*d*).

It was sought to extend this doctrine to a case where the master of a grammar school, annexed to a cathedral, had been removed by the dean and chapter for publishing a pamphlet reflecting on the bishop as visitor as well as on the dean and chapter; but the Court refused to consider the bishop as having any interest unfitting him to act as visitor; and, on the ground of the existence of such visitor, refused a mandamus (*e*). "Those who contend for the disqualification," said Lord Campbell, "might just as well say that if the master had been removed for a libel on the judges of the Queen's Bench, we should for that reason have had no jurisdiction" (*f*).

Exercise of discretionary powers.

★ If the right of approving a fit and proper [★ 260] person for an office is vested in any particular individual or tribunal, though the High Court of Justice will not sit on appeal from the decision arrived at by such individual or tribunal, it will see that in arriving at that decision a deliberate and considerate judgment has been exercised.

The discretion must, in the language of Lord Mansfield (*g*), be exercised in a manner "fair, candid, and

(*c*) R. *v.* Bishop of Ely, 2 T. R. 290.
(*d*) R. *v.* Chester, 2 Str. 797.
(*e*) R. *v.* Rochester, 17 Q. B. 1.
(*f*) Id. 34.
(*g*) R. *v.* Askew, 4 Burr. 2189. "Wheresoever a person hath

unprejudiced," and not "arbitrary, capricious, or biassed, much less warped by resentment or personal dislike."

Where the right of approving a fit and proper person to be appointed to an endowed lectureship, was by statute vested in the bishop of the diocese, the duty of the bishop was described by Lord Ellenborough thus (*h*):—"to exercise his conscience duly informed upon the subject; to do which he must duly, impartially, and effectually inquire, examine, deliberate, and decide. If the Court have reason to think that anything is defectively done in this respect, it will interpose its authoritative administration."

But, although the Court will insist on a conscientious judgment being used in the exercise of a discretionary power of choosing or rejecting, of approving or disapproving, it will not compel a disclosure of the grounds on which the result is arrived at (*i*).

And the Court will not substitute its own conscience for that of the other tribunal, or its own sense of fitness for the approval or disapproval of that other tribunal.

"For if a matter is left to the discretion of any individual or body of men, who are to decide according to their own conscience and judgment, it would be absurd to say that any other tribunal is to inquire into the grounds and reasons on which they have decided, and whether they have exercised their discretion properly or not" (*k*).

[★261] ★This was so held as to the disapproval by a bishop, in the exercise of a discretion vested in him, on what appeared to him good and sufficient grounds, of a deputy registrar of a diocese (*l*); also as to the refusal to admit to an office to which, by a bye-law of the cor-

power to do a thing at his discretion, it is to be understood of sound discretion and according to law, and this Court hath power to redress things otherwise done." *Per* Bacon, J., Estwick *v.* City of London, Styles, 43.

(*h*) R. *v.* Archbishop of Canterbury, 15 East, 139.

(*i*) See *per* Lord Ellenborough, R. *v.* Archbishop of Canterbury, 15 East, 142, and *per* Lord Tenterden, R. *v.* Mayor of London, 3 B. & Ad. 269. See also *per* Holt, C.J., Phillips *v.* Bury, 2 T. R. 356.

(*k*) *Per* Lord Tenterden, C.J., R. *v.* Mayor, &c., of London, 3 B. & Ad. 271. See also *per* Lord Ellenborough, R. *v.* Archbishop of Canterbury, 15 East, 157; R. *v.* Visitors of Middlesex Asylum, 2 Q. B. 433.

(*l*) R. *v.* Bishop of Gloucester, 2 B. & Ad. 158; cf. Wright *v.* Fawcett, 4 Burr, 2044. "There is no instance of an application for a mandamus to compel a bishop to approve: we can only compel him to inquire."

poration "it should be lawful" for the corporation to admit, such words leaving it discretionary with the corporation to admit or not (*m*); and as to the refusal of an inclosure commissioner to effect an exchange under an Act which used the words "it shall and may be lawful" (*n*).

On a similar ground the Court refused a mandamus to compel justices to order prisoners a certain kind of food, the quality and quantity of the food being left to the discretion of the justices (*o*).

Arbitrary or unjust rules for exercising discretion.

If a tribunal in which is vested a discretion of a judicial kind lays down and acts on arbitrary or unjust rules for the exercise of it, the Hight Court will interfere by mandamus.

Several cases on this point have been decided with reference to the rules of quarter sessions for entering continuances and hearing appeals. See under the heading Quarter Sessions, *post*, p. 301 *et seq.*

When quarter sessions, on the hearing of an adjourned appeal, dismissed the appeal on the ground that they had no authority to try it, because sufficient length of notice had not been given to the respondents according to a new rule of practice, promulgated two sessions before but then first acted on, and which was not known to the appellant's solicitor, who had conformed himself to the former practice, the Court granted a mandamus to the sessions to enter continuances and hear the appeal (*p*).

The High Court has also interfered to prevent hardship in the application of a rule of practice, reasonable in itself and known to the parties. Thus where an appeal was dismissed by quarter sessions on account of the appellant's solicitor having mistaken the meaning of a rule, which had been in force for years, as to the length of notice to the respondents, the Court thought justice ★ would be most satisfactorily admin- [★ 262] istered by ordering quarter sessions to enter continuances and hear the appeal (*q*).

If an appeal is dismissed for want of notice where no rule of sessions requires one, a mandamus will be granted (*r*).

Malice or interested motives.

A discretion vested in an individual or body of persons may be called in question on the ground of mali-

(*m*) R. *v* Eye, 1 B. & C. 85.
(*n*) R. *v.* Flockwold Inclosure, 2 Chitt. 251.
(*o*) R. *v.* North Riding of Yorkshire, 2 B. & C. 286.
(*p*) R. *v.* Wiltshire, 10 East, 404.
(*q*) R. *v.* Lancashire, 7 B. & C. 692.
(*r*) R. *v.* West Riding of Yorkshire, 5 B. & Ad. 667.

cious feelings indulged in by him or them towards the applicant, or on the ground of some personal or private interests adverse to his (*s*).

Compulsory exercise of discretion.

We must distinguish between the class of cases in which there is a legal duty imposed to exercise a judicial discretion and the class of cases where there is no such duty, but where the matter is left quite at the mere will and pleasure of some person or body. In the latter class of cases the Court will never interfere at all; in the former class it will.

If the proper tribunal for exercising a judicial discretion in any matter refuses to exercise it, the Court will by mandamus compel the performance of the duty.

"If" said Best, J. (*t*), "the law requires a certain thing to be done, we may order it to be done by the party upon whom the obligation of doing it is imposed. If he is to act according to his discretion, and he will not act or even consider the matter, we may compel him to put himself in motion to do the thing; but we cannot control his discretion."

If justices reject an application in the exercise of a discretion vested in them by the Legislature, the High Court will not interfere; but if they reject on the erroneous ground that they have no power to grant it, the Court will interfere so far as to set the jurisdiction of the justices in motion, by directing them to hear and determine upon the application (*u*),

Distinction between particular and general discretion.

A distinction is sometimes made between a general [★ 263] discretion ★ and a particular discretion; between a discretion to do or not to do a certain thing, and a discretion only as to the mode of doing something which it is obligatory to do somehow.

Thus where justices of a county, into which an apprentice was bound, refused to allow the binding, under 56 Geo. 3, c. 139, s. 2, without inquiring into the circumstances or character of the individuals, a mandamus was moved for on the ground that they had not exercised their jurisdiction on the only point on which they were entitled to exercise it, *i.e.* the fitness respectively of the master and apprentice; but the Court refused it, Lord Tenterden, C.J., observing: "If they had only

(*s*) See *per* Lord Denman, R. *v.* Darlington, 12 L. J. Q. B. 128.

(*t*) R. *v.* North Riding of Yorkshire, 2 B. & C. 291.

(*u*) See *per* Lord Ellenborough, R. *v.* Kent, 14 East, 397. See R. *v.* Surrey, 2 Show, 74, n. "If persons exercising an inferior jurisdiction, on a mistaken view of the law, refuse to hear a case, they erroneously decline to exercise their jurisdiction; and this Court will compel them by mandamus to hear and decide it" (*per* Blackburn, J., R. *v.* Monmouth, L. R. 5 Q. B. 256).

a particular discretion and had not exercised it, the Court would have compelled them to do so; but here they have a general discretion, after inquiring into all the circumstances of the case, to determine on the fitness of the binding; and as they have exercised it, there is no ground for a mandamus" (*x*).

A rector has not a general discretion to bury or not to bury the corpse of a parishioner in the churchyard; but he has a particular discretion as to the part of the churchyard in which it shall be buried, which latter discretion, when exercised, the Court will not interfere with (*z*).

Mandamus not granted to review erroneous judgment.

Though the High Court may command the judge of an inferior Court to give judgment in a manner fit and proper for his cognizance, it cannot by means of a mandamus review his proceedings, or try upon affidavit any alleged irregularity in his judgment (*a*). On this ground the Court refused an application for a mandamus to the judge of an inferior court of competent jurisdiction to award a new trial in a cause before him, on an affidavit that gross injustice had been done to the defendant (*b*).

The decision, however erroneous, of the proper officer or tribunal on a matter within his or its jurisdiction, cannot be called in question by mandamus.

The interference of the Court by mandamus is, in the language of Lord Denman (*c*), occasioned by inferior Courts or persons refusing to proceed in some course prescribed by law, and not in ★ consequence [★ 264] of any misapprehension or error in that course, provided they have entered upon it.

Where a verdict of guilty had been wrongly entered at quarter sessions, on the findings of the jury, the High Court held that it had no jurisdiction to grant a mandamus to rectify the error. "If a motion for a mandamus were entertained in such a case as this," said Littledale, J., "parties would come from every court of criminal jurisdiction in the kingdom to have records altered: if any injustice had been in this particular case, application must be made to the Secretary of State" (*d*).

(*x*) R. *v.* Mills, 2 B. & Ad. 578.
(*z*) *Ex parte* Blackmore, 1 B. & Ad. 123.
(*a*) *Ex parte* Morgan, 2 Chitt. 250.
(*b*) Ib.
(*c*) R. *v.* Eastern Counties Railway Co., 10 A. & E. 547; cf. R. *v.* Lincoln, 2 T. R. 338, note (*a*); R. *v.* Worcester, 4 M. & S. 415.
(*d*) R. *v.* Hewes, 3 A. & E. 731. This case is quite different from R. *v.* Middlesex, 5 B. & Ad. 1113, where the applicant, who

The sentence of a visitor of a cathedral in a case within his jurisdiction cannot thus be questioned (*e*). The same is true of the visitor of a college (*f*).

Nor can the decision of a bishop in whom is vested the right of approval of a fit and proper person for a lectureship (*g*): the Court cannot say to him "approve, though you do not approve; take our conscience to guide you and not your own" (*h*).

As the General Council of Medical Education and Registration of the United Kingdom has power, under 21 & 22 Vict. c. 90, s. 29, of adjudging any medical registered practitioner guilty of infamous conduct in any professional respect, and directing the registrar to erase his name from the register, the Court will not interfere by mandamus to restore any person whose name has been so erased (*i*).

Inspection of public documents.

[★ 265] ★ The Court has authority to enforce by mandamus the production of every document of a public nature in which any one of Her Majesty's subjects can prove himself to be interested (*k*). "For such persons, indeed," said Lord Denman, "every officer appointed by law to keep records ought to deem himself, for that purpose, a trustee" (*l*).

But if the only interest an applicant has is to gratify a rational curiosity, this will not be sufficient; he must have some direct and tangible interest in the production of the documents (*m*).

On this ground the Court held, in *R.* v. *Justices of Staffordshire* (*n*), that a ratepayer was not entitled to inspection of the accounts of the treasurer and high constable of a county, which had been duly passed by quarter sessions, and deposited with the clerk of the

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had been convicted at the Old Bailey, was held entitled to a mandamus to have the record made up. See further under "Quarter Sessions," *post*, p. 301 *et seq.*

(*e*) R *v.* Bishop of Chester, 1 W. Bl. 22; 1 Wils. 206.

(*f*) R. *v.* Alsop, 2 Show, 170. See also Witherington *v.* C. C. Camb., 1 Sid. 71; Apleford's case, 2 Keb. 799, and on return made, 2 Keb. 861. See Phillips *v.* Bury, 2 T. R. 351, where Holt. C.J., says: "If the sentence be given by him that is visitor, created so by the founder or by the law, you shall never inquire into the validity or ground of the sentence." See also *post*, p. 288.

(*g*) R. *v.* Archbishop of Canterbury, 15 East, 117.

(*h*) *Per* Lord Ellenborough, *id.* 139.

(*i*) *Ex parte* La Mert, 4 B. & S. 582; R. *v.* General Council of Medical Education, &c., 3 E. & E. 525.

(*k*) See *per* Lord Denman, R. *v.* Staffordshire, 6 A. & E. 99, 100. See also R. *v.* Marylebone, 5 A. & E. 268; R. *v.* Tower Hamlets, 3 Q. B. 670.

(*l*) R. *v.* Staffordshire, *ubi supra.*

(*m*) Id., p. 101.

(*n*) *Ubi supra.*

peace; for moneys paid by the treasurer out of a bygone rate, even if the expenditure were now discovered to be illegal, could not be recovered from him or the individual justices who had sanctioned the payments. A previous case (*o*), to a contrary effect, was carefully considered and deliberately dissented from in this case, with the concurrence of one of the judges who was a party to the judgment in the former case.

A rule for a mandamus to churchwardens to allow inspection of their accounts under 17 Geo. 2, c. 38, was discharged on the ground that the applicant, not having shewn the grounds on which he desired inspection, had not brought himself within the rule for granting a mandamus (*p*).

But in a later case (*q*) a rated parishioner, without shewing any grounds, obtained a mandamus to compel the guardians, churchwardens and overseers of the parish allow him inspection of the books of accounts of the receipts and expenditure and application of the rates of the parish, and to allow him to take copies and extracts.

A freeman desiring inspection of the corporation charters, &c., ★ on behalf of a sheriff who [★ 266] was being tried for not executing a criminal, was refused a mandamus (*r*).

On application against parish officers for production of a pauper's indenture of apprenticeship (pending an appeal against an order of removal), the Court considered it impossible to regard the indenture as a public document (*s*). Neither can the books of a mere trading corporation be so regarded (*t*).

In a litigation actually pending between the freemen of a borough and the corporation, the former were held entitled to a mandamus to inspect the deeds, &c., of the corporation (*u*). But, according to Lord Tenterden (*x*), in all the cases where a mandamus for this purpose has been granted, the application has been limited by some legitimate and particular object in which the applicant has an interest; there either was a litigation actually pending or imminent; wherever this was not the case, the mandamus was refused.

(*o*) R. *v.* Leicester, 4 B. & C. 891 ; cf. R. *v.* Nottingham, 3 A. & E. 500.
(*p*) R. *v.* Clear, 4 B. & C. 899; 7 D. & R. 393.
(*q*) R. *v.* Great Faringdon, 9 B. & C. 541.
(*r*) R. *v.* Antrobus, 2 A. & E. 789.
(*s*) R. *v.* Westoe, 5 A. & E. 786.
(*t*) R. *v.* Bank of England, 2 B. & Ald. 620.
(*u*) R. *v.* Beverley, 8 D. 140.
(*x*) R. *v.* Merchant Taylor's Co., 2 B. & Ad. 124.

A mandamus to compel a parish to allow inspection of the parish books was granted, where there was an action pending for a false return to a mandamus to swear in the plaintiff as a churchwarden (*z*); also to compel a bishop to allow inspection of his register of presentations and institutions to a living in his diocese, by a person claiming the right of patronage against the bishop (*a*); also to compel the corporation to allow inspection of their books by a person claiming to be admitted a member of the fraternity of hostmen of the borough (*b*); also to compel the lord of a manor to allow inspection of the Court rolls, where a distinct controversy had arisen between him and a copyhold tenant as to the right of cutting underwood (*c*); in a case where an action was pending between two freeholders and tenants of a manor as to a right of common in the manor (*d*); and in other cases all the copyholders, [★ 267] ★ and persons having a *primâ facie* title to be so, have been held entitled to inspect the Court rolls (*e*).

But in one case the assistance of the Court was refused to the freehold tenant of a manor, whose affidavit merely stated that he had occasion to inspect the Court rolls, and that inspection had been refused him (*f*); and Coleridge, J., thought that the demand for inspection should not be made by a delegated authority (*g*).

A mandamus was also denied to a parishioner to inspect the parish books for the purpose merely of getting information which might be useful to him in support of his claim to an estate in the parish (*h*).

Even where a litigation was actually pending between the applicant and a municipal corporation, inspection was refused him where he was a stranger to the corporation (*i*). But a person could not be said to

(*z*) Love *v.* Bentley, 11 Mod. 134.

(*a*) R. *v.* Bishop of Ely, 8 B. & C. 112.

(*b*) R. *v.* Hostmen of Newcastle, 2 Str. 1223.

(*c*) R. *v.* Tower, 4 M. & S. 162. Smith *v.* Davis, 1 Wils. 104, is an old case to a contrary effect.

(*d*) Rogers *v.* Jones, 5 D. & R. 484. R. *v.* Shelley, 3 T. R. 141.

(*e*) R. *v.* Lucas, 10 East, 235; *per* Holt, C.J., in Love *v.* Bentley, 11 Mod. 134.

(*f*) R. *v.* Allgood, 7 T. R. 746. No distinct controversy had arisen as in R. *v.* Tower (*ubi supra*). See also R. *v.* Maidstone, 6 D. & R. 334. In *Ex parte* Hutt, 7 D. 690, a "person interested in" the property, was considered by Coleridge, J., entitled to a mandamus to inspect. And see *Ex parte* Barnes, 2 D. N. S. 20.

(*g*) *Ex parte* Hutt, 7 D. 690.

(*h*) R. *v.* Smallpiece, 2 Chitt. 288.

(*i*) See R. *v.* Babb, 3 T. R. 579; Mayor of Southampton *v.* Graves, 8 T. R. 590; Hodges *v.* Atkis, 3 Wils. 398; Cox *v.* Copping, 5 Mod. 395.

be altogether a stranger to the corporation if he were living in a place under its rule and government. Such a person was granted a mandamus to inspect and take copies of a bye-law, for breach of which he was actually being sued (*k*); the mandamus when granted being limited to such books, &c., as related to the question in dispute (*l*).

A mandamus to compel the master and wardens of a city company to allow inspection of all records, books and muniments in their possession and copies to be taken was refused to certain members of the corporations who merely suggested grounds for thinking that the affairs of the company were improperly conducted and the officers unduly chosen, and who complained of misgovernment in some particular instances not affecting themselves (*m*).

★ A particular parish, which felt itself ag- [★ 268] grieved by an order of commissioners of sewers uniting it with a very expensive district, and by a joint rate made by the commissioners, which it was about to bring by *certiorari* before the Superior Court, having been allowed inspection of all proceedings and documents relating to the union of the levels and to the rate in question, was held not entitled to inspection of any other documents relating to the proceedings of the commissioners as to other places (*n*).

A mandamus was granted to compel parish officers to produce the parish rates and books at the scrutiny of a poll, which had been taken for the election of churchwardens, overseers and surveyors (*o*).

It must be remembered as to all the foregoing cases that, at the time these mandamuses were granted, the Courts of Common Law had not the power to grant discovery which they afterwards obtained, even before the Judicature Acts fused them with the Court of Chancery. A mandamus would not now be necessary, and therefore would not be granted, wherever a litigation was actually pending, in which discovery could be obtained in the ordinary manner. The remedy by mandamus may still, however, be usefully invoked in cases where no litigation is pending; or where, though there is a litigation, the custodians of the public documents are not parties to it.

(*k*) Harrison *v.* Williams, 4 D. & R. 820, citing and approving Brewers' Co. *v.* Benson, Barnes, 236.
(*l*) Harrison *v.* Williams, 4 D. & R. 823.
(*m*) R. *v.* Merchant Taylors' Co., 2 B. & Ad. 115.
(*n*) R. *v.* Commissioners of Tower Hamlets, 3 Q. B. 670.
(*o*) R. *v.* Fall, 1 Q. B. 636.

Inspection would not be enforced against a person who is proceeded against criminally (*p*).

Mandamus to pay money.

Where the applicant is legally entitled to a sum of money and has no other means of obtaining it, a mandamus will be granted for the purpose (*q*).

Thus where the Act of Parliament incorporating a dock company directed that all actions against the company should be prosecuted against the treasurer for the time being, but that his goods, &c., should not thereby be liable to execution; an action having been brought against the treasurer and referred to arbitration (which ended in an award against the treasurer for a certain sum and costs), a mandamus was granted [★ 269] to the treasurer and directors ★ of the company to pay the sums awarded—there being, under the circumstances, no other mode by which payment could be enforced (*r*): "As in this case," said Parke, J., "there is no other legal remedy by which the company can be made subject to the payment of its debts, it follows that a mandamus will lie."

In a previous case, where, under similar circumstances, judgment had been obtained against the clerk of certain turnpike trustees, a writ of *fi. fa.* which had been issued against him personally was set aside, Tindal, C.J., saying that there could be no doubt that the funds of the trustees might be made answerable for the amount either by a mandamus or a bill in equity (*s*).

R. v. *The Commissioners of the Thames and Isis Navigation* (*t*), where a mandamus was granted to compel the payment of compensation assessed by quarter sessions, appears to have been decided on the same ground.

A mandamus was also granted to compel a company to pay the amount of damages assessed by a jury, in a case where there was no other effective or beneficial remedy (*u*); but this was at a time when it was thought that the amount could not be recovered by action. See now *post*, p. 331.

A mandamus was, under peculiar circumstances, granted to the Lords of the Treasury ordering payment of a retiring allowance, for which money had been

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(*p*) R. *v.* Cadogan, 5 B. & Ald. 902.
(*q*) See R. *v.* Longhorn, 17 Q. B. 77.
(*r*) R. *v.* St. Katherine's Dock Co., 4 B. & Ad. 360.
(*s*) Wormwell *v* Hailstone, 6 Bing. 668.
(*t*) 9 A. & E 804. See the note, pp. 811, 812.
(*u*) R. *v.* Nottingham Old Water Works, 6 A. & E. 355; R. *v.* Swansea Harbour, 8 A. & E. 439; R. *v.* Deptford Pier Co., 8 A. & E. 910.

voted by Parliament (*x*); but this case has since been disapproved by the Court of Appeal.

Where justices in quarter sessions, on the hearing of an appeal, ordered the person appealed against to pay a sum for costs, a ★ mandamus was granted [★ 270] to the county justices to issue a warrant for levying the amount (*y*).

In cases of this kind there must have been some fixed sum ordered to be paid. Where a judge of assize ordered payment of the costs of an indictment out of the highway rate of a parish, but no definite sum was named, a mandamus was refused (*z*), Williams, J., asking "How can a mandamus go for the payment of a sum not ascertained?"

Mandamuses have been granted to compel an overseer to pay over to the applicant money contracted to be paid him for maintaining and employing the poor of a parish (*a*); to compel municipal corporations to pay the amount of compensation for loss of office under the Municipal Corporations Act, 1835 (*b*), and the costs of the successful prosecutor in a writ of mandamus to compel the election of an alderman, in lieu of one ousted on *quo warranto* (*c*); to enforce payment by poor law guardians of a debt and interest (*d*), but, the debt being an old one, which by statute was to have been paid off by instalments, the Court refused a mandamus to compel the levying of a rate for the purpose, as there would be great injustice in throwing the whole burthen at once on the present parishioners (*e*). It was doubted whether a mandamus would be granted to reimburse money overpaid on parish rates (*f*).

(*x*) R. *v.* Commissioners of Treasury, 4 A. & E. 286. The Court distinguished this case from the Bankers' case, 5 Mod. 29, the proceeding in that case being not for a specific sum in the hands of a public officer, but for payment of an annuity granted generally out of the hereditary revenue to discharge a debt of the Crown; whereas here the demand was not against the Crown, but against public officers having money in their hands to be paid to an individual. Cf. R. *v.* East India Co., 4 M. & S. 279. See the observations upon R. *v.* Commissioners of Treasury, *post*, pp. 347, 348.

(*y*) R. *v.* Justices of Hants, 1 B. & Ad. 654.

(*z*) R. *v.* Clark, 5 Q. B. 887.

(*a*) R. *v.* Beeston, 3 T. R. 592.

(*b*) R. *v.* Warwick and Newbury, 10 A. & E. 386; 1 Q. B. 751; R. *v.* Cambridge, 12 A. & E. 702; R. *v.* Sandwich, 10 Q. B. 563; R. *v.* Stamford, 6 Q. B. 433; R. *v.* Liverpool, 8 A. & E. 176.

(*c*) R. *v.* Cambridge, 14 L. J. Q. B. 82.

(*d*) R. *v.* Carpenter and Others, 6 A. & E. 794.

(*e*) Id.

(*f*) Anon., Comb. 257; cf. *Re* Lodge, 2 A. & E. 123.

A mandamus was granted to compel churchwardens to pay to a clergyman the arrears of salary to which he was entitled under a local Act (*g*); to commissioners under a local Act, to compel them to levy a rate for the purpose of paying off a sum borrowed on the security of the rates by their predecessors more than twenty years before, no interest having been paid in the meantime (although their Act directed that the commissioners should be sued in the name of their clerk), as [★ 271] an action would have been barred by lapse ★ of time (*h*); but not to compel the treasurer of a district, county or town, to pay the costs of prosecutions pursuant to order of Court of Assize, as, besides being an inferior officer amenable to others, he might be indicted should he refuse (*i*).

Delivering up of public books &c.

Where public books, &c., are kept in connection with a public office, the Court, in the absence of any other remedy, has granted a mandamus to compel the delivery up of the books, &c., to the officer entitled to their custody (*k*).

Mandamus to take legal proceedings.

A mandamus will not, it seems, be granted to compel one person to take legal proceedings against another (*l*).

A mandamus addressed to a party bound by statute to levy certain moneys and pay them over to another, directing him "to take the necessary and legal measures and proceedings for obtaining and recovering payment," was held not necessarily to mean the instituting of legal proceedings (*m*).

To command another person.

A mandamus will not be granted directing one person to command another to do something (*n*).

Cases in which a mandamus would formerly, but not now, be granted.

Various changes in the law and in the constitution of the Courts have rendered unnecessary the remedy by mandamus, in many cases in which it was formerly the only method of attaining the object desired.

The transference to the Court of Probate of the jurisdiction in case of wills of the various Ecclesiastical Courts, and the subsequent merging of the Probate

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(*g*) *Ex parte* Scott, 8 D. 328.

(*h*) R. *v.* St. Paul's, Shadwell, 1 M. & R. 59.

(*i*) R. *v.* Jeyes, 3 A. & E. 416 (and cases therein referred to). For a similar application against a surveyor of highways, see R. *v.* Clark, 5 Q. B. 887. See the observations on these cases *ante*, pp. 239, 240.

(*k*) See R. *v.* Christchurch, 7 E. & B. 409, *seq.*

(*l*) R. *v.* Southampton, 1 B. & S. 5; 30 L. J. Q. B. 244; L. R. 4 Eng. & Ir. App. 475. See also *Ex parte* Carlton High Dale, 4 M. & N. 313.

(*m*) R. *v.* Southampton, *ubi supra.*

(*n*) R. *v.* Mayor, &c., of Derby, 2 Salk. 436.

Court in the High Court of Justice, have got rid of frequent occasions for the remedy by mandamus.

The abolition of the old Commissioners in Bankruptcy and Insolvency, has also relieved the Court from the necessity of sometimes compelling, by mandamus, the performance of their duties.

A mandamus is no longer necessary to compel a company to register a transfer of its stock or shares, or to rectify its register (*o*); ★ neither would it [★272] now be granted to compel a company to pay the amount of compensation assessed by a jury (*p*).

In one case a mandamus was granted to compel two arbitrators under a Canal Act, who could not agree upon an umpire, to do so (*q*). The difficulty in such a case is now more satisfactorily provided for by the power given to the Superior Courts by the Common Law Procedure Act, 1854, sect. 12, to appoint an umpire where the arbitrators fail to do so (*r*).

Effect of Judicature Acts.

On the other hand, in former times the Court exercised its jurisdiction with considerable hesitation in cases where any doubt existed; as the form and method of proceeding prevented a revision of its judgment by any Court of Error (*s*).

The change of procedure effected by the Judicature Acts (giving a right of appeal from every order or judgment of a Divisional Court) will justify a freer use of the jurisdiction in future (*t*).

(*o*) Vide *post*, p. 334.

(*p*) *Post*, p. 331.

(*q*) R. *v.* Goodrich, 3 Smith, 388.

(*r*) Curious examples of ancient use of this remedy were mandamuses to compel a husband to give his wife alimony, and to compel the delivery of the sacrament; which even in the early part of Charles II.'s reign had become, *per* Windham, J., examples "not to be followed."—2 Keb. 167.

(*s*) See R. *v.* Greene, 6 A. & E. 548; R. *v.* Mayor of Truro, 3 B. & Ald. 590; R. *v.* Bishop of Ely, 1 W. Bl. 52.

(*t*) Vide *post*, p. 380.

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★CHAPTER IV.

OFFICES IN RESPECT OF WHICH A MANDAMUS HAS BEEN GRANTED.

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The general principles regulating the granting or refusing of a mandamus having been discussed in the last chapter, we shall now proceed to shew how, and in what classes of cases, they have been applied in practice.

Election, admission and restoration to offices.

And, first, they have been applied to compel the election and the admission (with the performance of all requisite formalities) to various public offices and franchises, of persons entitled to admission; and the restoration to such offices or franchises of persons wrongfully removed therefrom.

This chapter will be confined to the consideration of cases of this kind.

Enumeration of offices in respect of mandamus granted.

The following offices have been held of a sufficiently public nature to justify the interposition of the Court by mandamus, in questions relating to the election or appointment, admission or restoration, to them; viz., those of mayor, alderman, and town councillor; burgess, (common, free, chief, principal or capital); freeman (of a borough or of a company), and various freehold offices connected with corporations, such as chamberlain, jurat, high steward, bailiff, serjeant-at-mace, swordbearer and constable; parish clerks and clerks of the peace; arch- [★ 274] deacon; vicar; curate; canon or ★prebend; chaplains of gaols or workhouses; endowed lecturers; endowed pastors of dissenters; masters of colleges and of grammar schools; churchwardens and chapelwardens;

overseers of the poor; surveyors of highways; sheriffs; poor law guardians; coroners; attorneys of corporations and of inferior courts; rate collectors; clerk of the peace (*a*); apparitor-general of the Archbishop of Canterbury.

In the older cases the office of clerk to guardians was regarded as that of a servant to a fugitive body, and so not one for a mandamus (*b*). But since *R.* v. *Darley* (*c*) a different view has prevailed; and there is no doubt that in a proper case a mandamus would now be granted for the office of clerk to a board of guardians (*d*).

As to the offices of sexton and schoolmaster, see note (*p*) on p. 285, *post*.

It has been said (*e*) that the office in respect of which a mandamus is grantable must have annexed to or issuing out of it fixed fees or emoluments or a salary; but that this is not so is shewn by the cases of poor law guardians, town councillors, churchwardens, &c., in respect of which mandamuses have frequently been granted.

Deputy.—The law applicable to the officers above enumerated would apply also to their deputies, if there existed a clear legal right to appoint a deputy (*f*). The deputy himself cannot obtain a mandamus, being removable at will; but the person who has a right to appoint a deputy may compel by mandamus admission to the office (*g*).

Where the charter of a corporation was silent on the subject of the appointment of a deputy sub-seneschal or under-steward, a mandamus to compel the mayor, &c., to admit a deputy appointed by the under-steward was refused (*h*); and, for a like reason, a mandamus was also refused in the case of a deputy appointed by the recorder of a borough (*i*).

★ The Court has refused to interfere by [★ 275] mandamus in the case of officers held, not for life or *quamdiu se bene gesserit*, but merely at pleasure (*k*); Offices in respect of which Court has refused to interfere.

(*a*) As to the origin and nature of this office, see 4 Mod. 172, and Lord Ray. 158.

(*b*) See R. *v.* St. Nicholas, Rochester, 4 M. & S. 324. Cf. R. *v.* Dolgelly, 8 A. & E. 561.

(*c*) 12 Cl. & F. 520.

(*d*) See R. *v.* St. Martin's, 17 Q. B. 149; 20 L. J. Q. B. 423.

(*e*) Tapping on Mandamus, 176.

(*f*) R. *v.* Win. 2 Keb. 742; Anon., 1 Barn. 252; R. *v.* Ward, 2 Str. 893; cf. R. *v.* Clapham, 2 Keb. 738.

(*g*) Id.

(*h*) R. *v.* Gravessend, 2 B. & C. 602; 4 D. & R. 117.

(*i*) R. *v.* St. Alban's 12 East, 559.

(*k*) See Warren's case, Cro. Jac. 540; Blagrave's case, 2 Sid.

e.g., in the case of a clerk to justices, the office being one held at the mere pleasure of the justices (*l*); surgeon of a district prison in Jamacia, the office being held during pleasure (*m*); clerk to a dean and chapter (*n*); clerk to the company of butchers (*o*); a church organist, where there was no duty on the parishioners to have one at all (*p*); a vestry clerk, the office being one altogether dependent on the will of the inhabitants, who may elect a different clerk at each vestry (*q*); and a sexton (*r*). Also in the case of mere private offices, which do not concern the public (*s*); as that of clerk of a private company (*t*); and in the case of any servant of a merely fugitive body (*u*); and also in the case of an office not known to the law, *e.g.*, that of second curate (*x*).

There are other cases in which, though the office is of sufficient public importance, the Court for various reasons (which will be dealt with hereafter) has refused to interfere by mandamus; such as that of a barrister or member of an inn of court, or other voluntary society; advocate of the Court of Arches; member of the College of Physicians; unendowed lecturers.

Discretionary refusal.

[★ 276] ★ There are also cases where, from the nature of the office in question and the absence of other remedy, the proper procedure is by mandamus; yet the Court, in the exercise of its discretion, will refuse its assistance.

49; R. *v.* Coventry, 2 Salk. 430; Burke *v.* Richmond Bridewell, 4 Ir. C. L. R. N. S. 601.

(*l*) *Ex parte* Sandys, 4 B. & Ad. 863; cf. R. *v.* Manchester, 16 L. J. Q. B. 27.

(*m*) Hill *v.* Reg., 8 Moore P. C. C. 138.

(*n*) *Anon.*, Comb. 133. As to a registrar of a dean and chapter, *vide* same report; and as to a clerk in the office of *custos brevium*, see Whitchurch *v.* Pagot, Styles, 208.

(*o*) White's case, 6 Mod. 18. From a note, however, to this case it appears that according to Lord Raymond's report (2 Lord Ray. 1004) of the case the mandamus was granted. The report in 3 Salk. 232, agrees with that in 6 Mod. 18. But in R. *v.* Aldermen of London, 2 Barnard. 398, Lee, J., said, that since Lord Holt's time mandamuses have been granted for sextons and clerks of private companies.

(*p*) *Ex parte* Le Cren, 2 D. & L. 571.

(*q*) R. *v.* Croydon, 5 T. R. 714.

(*r*) R. *v.* Thame, 1 Str. 115.

(*s*) But the value of the matter, or the degree of its importance to the public is not scrupulously weighed. (*Per* Lord Mansfield, R. *v.* Barker, 3 Burr. 1267.)

(*t*) White's case, 6 Mod. 18; relating to the office of clerk to the Company of Butchers.

(*u*) *Per curiam*, R. *v.* St. Nicholas, Rochester, 4 M. & S. 326.

(*x*) *Anon.*, 2 Chitt. 253. Lord Ellenborough in this case said that the Court could not grant a mandamus for an office *in fieri*.

Thus where, on the argument of the order *nisi*, or from the return, it is made to appear that there was sufficient justification for a removal from office, however irregularly accomplished, a mandamus to restore will be refused (*z*).

The reason was thus stated by Bayley, J., in one case: "Although there may be objections to the mode of removal in this case, still, as it appears on the face of the return that there is good ground for the removal, the only effect would be that, if we were to make an order for restoring the defendant to his office, it would become the duty of the corporation to remove him again, in a more formal manner, for his preceding neglect of duty. Under these circumstances, therefore, I think we shall best exercise the discretion vested in us by refusing to grant a peremptory mandamus" (*a*).

Mandamus to elect.

The Court has granted a mandamus to elect to the following offices: that of mayor (*b*); alderman (*c*); town councillor (*d*); burgess (*e*); capital burgess (*f*); chief burgess (*g*); principal burgess (*h*); free burgess (*i*); bailiffs, coroners, chamberlains, and other annual ★ officers of a corporation (*k*); high constables, [★ 277] constables and tything-men (*l*); town clerk (*m*); cor-

(*z*) R. *v.* Axbridge, Cowp. 523; R. *v.* Mayor, &c., of London, 2 T. R. 177; R. *v.* Mayor, &c. of Bristol, 1 D. & R. 389; R. *v.* Griffiths, 5 B. & Ald. 731; R. *v.* Mayor, &c., of Newcastle, cited 1 Burr. 530; R. *v.* Cambridge, 6 T. R. 99.

(*a*) R. *v.* Griffiths, 5 B. & Ald. 736.

(*b*) R. *v.* Willis, Andr. 279; Tintagel case, 2 Str. 1003; Aberystwith case, *id.* 1157; R. *v.* Truro, 2 Chitt. 257; R. *v.* Abingdon, Holt, 441; R. *v.* Heydon, Sayer, 208; R. *v.* Carmarthen, *id.* 211; R. *v.* Wigan, 2 Burr. 782; R. *v.* West Loe, 3 Burr. 1386; R. *v.* Cambridge, 4 Burr. 2008; R. *v.* Plymouth, 1 Barn. 81; R. s. Robbison, 1 Str. 555; R. *v.* Morgan, 7 Mod. 322; R. *v.* Hoskins, Cas. t. Hard. 188; R. *v.* Edyvean, 3 T. R. 352; R. *v.* Bankes, 3 Burr. 1452; R. *v.* Bedford, 1 East, 79.

(*c*) R. *v.* Bridgwater, 2 Chitt. 256; R. *v.* Evesham, 7 Mod. 166; 2 Str. 949. But the Court will not prescribe any time for the election, which must be made agreeably to the charter and according to law. Ib.

(*d*) R. *v.* Leeds, 7 A. & E. 963.

(*e*) R. *v.* Bridgwater, 2 Chitt. 256; R. *v.* Carmathen, 1 M. & S. 697. See R. *v.* West Looe, 3 B. & C. 677; R. *v.* Doncaster, 7 B. & C. 630.

(*f*) Ilchester case, 2 Chitt. 257, note (*a*); R. *v.* Grampound, 6 T. R. 301; *Anon.*, 1 Barn. 227; R. *v.* Doncaster, *id.* 264; R. *v.* Esham, 2 Barn. 265; R. *v.* Evesham, 2 Str. 949.

(*g*) R. *v.* Monmouth, 4 B. & Ald. 496.

(*h*) R. *v.* Thetford, 8 East, 270.

(*i*) R. *v.* Fowey, 2 B. & C. 584.

(*k*) Scarborough case, 2 Str. 1180. See further as to bailiffs, R. *v.* Malden, 2 Salk. 431.

(*l*) R. *v.* Milverton, 3 A. & E. 284.

(*m*) R. *v.* Chapman, 6 Mod. 152.

oner (*n*); portreeves (*o*); assessors to revise the burgess lists under the repealed statute 7 Wm. 4 and 1 Vict. c. 78 (*p*); clerk of land tax commissioners (*q*); poor law guardians (*r*); clerk to a board of guardians (*s*); trustees for lighting, watching, &c., a parish (*t*); a vestry and auditors of accounts (*u*); churchwardens and overseers of the poor (*x*), and sidesmen (*y*); canons residentary (*z*); an endowed lecturer (*a*).

As to the master and wardens of a chartered company, see *R.* v. *Atwood* (*b*) and *R.* v. *Chester* (*c*).

As to a sexton, see *R.* v. *Stoke Damarel* (*d*), and note (*p*), *post*, p. 285.

The writ has been refused in the case of an organist of a parish church (*e*), and in the case of a fellow of a college; the jurisdiction being with the visitor and not with the courts of law (*f*).

The dictum of Holt, C.J. (*g*), that the visitor has no jurisdiction till after the admission of the applicant, is clearly not law (*h*).

The Court in granting a mandamus to elect will not, as already stated (*i*), fix any precise day for the elec- [★ 278] tion, but will leave that ★ to the proper officer (*k*). Neither will it order any particular panel to be summoned as a jury (*l*).

(*n*) Scarborough case, 2 Str. 1180.
(*o*) R. *v.* Williams, Sayer, 140.
(*p*) R. *v.* Weymouth, 7 Q. B. 46.
(*q*) R. *v.* Land Tax Commissioners, 1 T. R. 146.
(*r*) R. *v.* Norwich, 1 B. & Ad. 310; R. *v.* Clerkenwell, 3 N. & M. 411.
(*s*) R. *v.* St. Martin's, 17 Q. B. 149.
(*t*) R. *v.* St. Luke's, 2 N. & M. 467.
(*u*) R. *v.* St. Pancras, 1 A. & E. 80.
(*x*) R. *v.* Wix, 2 B. & Ad. 197; R. *v.* Birmingham, 7 A. & E. 254; R. *v.* D'Oyley, 12 A. & E. 139; R. *v.* St. James's, Westminster, 5 A. & E. 391; R. *v.* Horton, 1 T. R. 374; Stutter *v.* Freston, 1 Str. 526; R. *v.* Lambeth, 8 A. & E. 356. *Anon.*, 2 Str. 687, has not been followed.
(*y*) R. *v.* St. James's, Westminster, 5 A. & E. 391.
(*z*) *Per* Buller, J., Chichester *v.* Harward, 1 T. R. 652. As to a dean, see R. *v.* Exeter, 12 A. & E. 512.
(*a*) See 7 Mod. 356, note (*f*).
(*b*) 4 B. & Ad. 481. (*c*) 1 M. & S. 101. (*d*) 5 A. & E. 584.
(*e*) *Ex parte* Le Cren, 2 D. & L. 571.
(*f*) R. *v.* St. Catherine's Hall, 4 T. R. 233.
(*g*) Holt, 437.
(*h*) See St. John's College *v.* Todington, 1 Burr. 158; R. *v.* All Souls College, Sir T. Jones, 174; *Ex parte* Wrangham, 2 Ves. 609; and R. *v.* Hertford College, L. R. 3 Q. B. D. 701, 702.
(*i*) *Ante*, p. 277, note (*c*).
(*k*) R. *v.* Bridgwater, 2 Chitt. 256; R. *v.* Evesham, 7 Mod. 166.
(*l*) R. *v.* Bankes, 3 Burr. 1454. A writ of restitution to elect a particular person was refused, 2 Bulst. 122.

Where the tellers appointed to take the numbers at an election differed, and a poll was demanded and refused, the Court granted a mandamus to enter an adjournment of the election and to proceed to complete it (*m*).

Where, out of four persons returned to the court of aldermen by the wardmotes, the court of aldermen was bound to choose one as alderman, and the wardmote chose four persons, but four other persons were returned, a mandamus to the returning officer to return the four chosen by the wardmote was refused, *dissentiente* Powys, J.; on the ground, *per* Eyre, J., that the mandamus should go to the court of aldermen suggesting that four had been chosen, and commanding them to choose one of them; on the ground, *per* Parke, C.J., that the proper course was for the persons grieved to apply to the court of aldermen for redress, and if they refused, the Court would then grant a mandamus to the court of aldermen (*n*).

Mandamus to appoint.

A mandamus has been granted to appoint to a mastership of a college (*o*); to a regius professorship (*p*); to appoint a chaplain for the union workhouse (*q*); churchwardens (*r*); member of a select vestry under 59 Geo. 3, c. 12 (*s*); surveyors of highways (*t*); overseers of the poor (*u*); master of a grammar school (*x*); usher of a free grammar school (*y*); parish clerk (*z*); chaplain of a gaol and house of correction (*a*); a returning officer for an election of ★ guardians (*b*); scavengers (*c*); but not to license a second curate, an office [★ 279]

(*m*) R. *v.* St. Luke's, 2 N. & M. 464.
(*n*) R. *v.* Heathcote, 10 Mod. 56, 59.
(*o*) R. *v.* Bishop of Ely, 2 T. R. 290.
(*p*) Barnard. B. R. 82, 7 Geo. 1, cited Cas. t. Hard. 215. But in this case either there was no visitor, or the fact that there was one was not brought to the notice of the Court. See *per* Lord Hardwicke, at p. 218.
(*q*) R. *v.* Braintree, 1 Q. B. 130.
(*r*) Anon., 1 Barnard. 155.
(*s*) R. *v.* Adams, 2 A. & E. 409.
(*t*) R. *v.* Pettiward, 4 Burr. 2452; R. *v.* Middlesex, 1 Dowl. 116; R. *v.* Denbighshire, 4 East, 142; R. *v.* Baldwin, 7 T. R. 169.
(*u*) R. *v.* Sparrow, 2 Str. 1123; R. *v.* Horton, 1 T. R. 374; R. *v.* Westmoreland, 1 Wils. 138; R. *v.* Worcestershire, 12 A. & E. 28; R. *v.* Salop, 3 B. & Ad. 910; R. *v.* Palmer, 8 East, 416; R. *v.* Rufford, 8 Mod. 39; R. *v.* Lancashire, 1 D. & R. 485.
(*x*) R. *v.* Abp. of York, 6 T. R. 490.
(*y*) R. *v.* Lichfield, 2 Str. 1023. See also R. *v.* Rushworth, W. Kelynge, 287.
(*z*) R. *v.* St. Anne's, Soho, 3 Burr. 1877.
(*a*) R. *v.* Bath and Wells, 5 Q. B. 147; R. *v.* Oxford, 7 East, 345.
(*b*) R. *v.* Oldham, 10 Q. B. 700; 16 L. J. M. C. 110.
(*c*) Ile's case, 1 Vent. 143, 153; See Anon., Styles, 346 (a mandamus to compel them to execute their office).

which appears not to be known to the law (*d*), or to practice medicine (*e*).

Mandamus to admit and if necessary swear into office.

A mandamus has been granted to admit, and, where necessary, to swear into the following offices persons whose right to them was complete (*f*): that of archdeacon (*g*); canon or prebendary (*h*); provost of Eton (*i*); warden of Dulwich College (*k*); vicar (*l*); curate of a chapel (*m*), or perpetual curate (*n*); minister of an endowed dissenting chapel (*o*); a chaplain of a college, the visitatorial power being suspended at the time (*p*); a fellow or master of a college (*q*), even, according to some of the older decisions (*r*), where [★ 280] ★ there was a visitor; but wherever there is a visitor it is now clear that a peremptory mandamus would not be granted (*s*), at any rate where the visitor

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(*d*) Anon., 2 Chitt. 253.

(*e*) R. *v.* Askew, 4 Burr. 2186, 2189.

(*f*) See *per curiam*, R. *v.* Orton, 14 Q. B. 145.

(*g*) R. *v.* Trinity Chapel, Dublin, 8 Mod. 27. See also R. *v.* Lambert, 12 Mod. 3.

(*h*) Clarke *v.* Sarum, 2 Str. 1082; the mandamus in this case also commanding to institute, induct, and invest. Cf. R. *v.* Stenhowe, 2 Show. 199; R. *v.* Norwich, 1 Str. 159; R. *v.* Dublin, 1 Str. 536; and R. *v.* Rochester, 3 B. & Ad. 95. Mandamuses to instal have also been granted, see R. *v.* Rochester, 1 Barn. 40; R. *v.* Salisbury, Andr. 20, and Dr. Sherlock's case there cited; R. *v.* Dean of Hereford, L. R. 5. Q. B. 196.

(*i*) Bland's case, referred to 1 Wils. 14.

(*k*) R. *v.* Dulwich College, 17 Q. B. 600.

(*l*) R. *v.* Kendall, 1 Q. B. 366, where the writ was to the master of a corporation, which had the right of nomination, to put the common seal to the presentation of a person elected by the majority.

(*m*) *Per* Lord Mansfield, 3 Burr. 1265, 1266.

(*n*) Faulkner *v.* Elger, 6 D. & R. 517.

(*o*) R. *v.* Barker, 3 Burr. 1265; cf. Peat's case, 6 Mod. 310.

(*p*) R. *v.* Chester, 2 Str. 797. As to a workhouse chaplain, see R. *v.* St. James's, Westminster, 17 Q. B. 474; R. *v.* Irish Poor Law Commissioners, 3 Ir. C. L. R. N. S. 147. And as to a chaplain of a lunatic asylum, R. *v.* Belfast Lunatic Asylum, 5 Ir. C. L. R. N. S. 375.

(*q*) Wolverton's case, P. 2, Ed. 2, cited 2 Keb. 172; R. *v.* St. Peter's College, 9 L. J. N. S. 321 Q. B. The latter case is thus commented upon by the judgment of the Court of Appeal in R. *v.* Hertford College, L. R. 3 Q. B. D. 703: "There are cases, no doubt, of which R. *v.* St. Peter's College, Cambridge, is an example, where the question arising on a pure point of law, as a right to nominate, entirely apart from the statutes, the college being indifferent, the machinery of mandamus has been used for the purpose of trying title; but such cases in no way interfere with the principle just laid down," *i.e.*, that the Courts refuse to interfere where there is a visitor.

(*r*) See R. *v.* Whaley, 2 Str. 1139; 7 Mod. 308; cf. R. *v.* Bishop of Chester, 1 Barn. 52.

(*s*) Dr. Patrick's case, 1 Lev. 65; 2 Keb. 167; Anon., 2 Barn.

does not act beyond his jurisdiction (*t*): to an endowed lectureship (*u*); a college librarian (*x*); to a college scholarship (*y*); to the office of mayor (*z*); alderman (*a*); common councilman (*b*); recorder (*c*); judge of the Sheriff's Court of the City of London (*d*); a sheriff (*e*); the high steward of a borough (*f*); bailiffs of a borough or corporation (*g*); a chamberlain (*h*); a commoner of a borough (*i*); burgesses (*k*); freeman of a borough ★ or city (*l*); jurat of a corpora- [★ 281]

437; R. *v.* New College, 2 Lev. 14; R. *v.* All Souls, Sir T. Jones, 174; 2 Show. 170 (nom. R. *v.* Alsop); Parkinson's case, Carth. 92; Dr. Robert's case, cited 2 Show. 170; R. *v.* St. Catherine's Hall, 4 T. R. 233; R. *v.* Hertford College, L. R. 3 Q. B. D. 693 (where see observations at pp. 701, 702, on the contention that the visitor has no jurisdiction until after admission). As to the effect of the visitatorial power being suspended, see R. *v.* Chester, 2 Str. 797.

(*t*) R. *v.* Ely, 2 T. R. 290, 336.

(*u*) *Per* Lord Mansfield, R. *v.* Barker, 1 W. Bl. 352; 3 Burr. 1267; R. *v.* Same, 1 T. R. 331. See and distinguish R. *v.* Bishop of London, 1 Wils. 11; R. *v.* Same, 13 East, 419; R. *v.* Archbishop of Canterbury, 15 East, 117; R. *v.* Bishop of Exeter, 2 East, 462; R. *v.* Bathurst, 1 W. Bl. 210.

(*x*) Archbishop of Canterbury *v.* Trinity College, Cambridge, 1 Barn. 194.

(*y*) R. *v.* St. John's College, 4 Mod. 260, 368.

(*z*) Manaton's case, Ray. 365; R. *v.* Tregony, 8 Mod. 111; R. *v.* Serle, id. 332; R. *v.* Stephens, Sir T. Jones, 177; R. *v.* Turner, id. 215; R. *v.* Hull, 11 Mod. 390.

(*a*) R. *v.* Norwich, 2 Salk. 436; R. *v.* Exeter, 1 Ld. Ray. 223; R. *v.* London, 9 B. & C. 1; R. *v.* Same, 3 B. & Ad. 255.

(*b*) *Per* Eyre, J., 1 Str. 539; R. *v.* Cambridge, 2 T. R. 456; R. *v.* Winchester, 7 A. & E. 215; R. *v.* Leeds, 7 A. & E. 963; Gay *v.* Cross, 7 Mod. 37; Anon., 2 Barn. 24; Warden *v.* Rous, 7 Mod. 323; R. *v.* Love, 12 Mod. 601; Fludier *v.* Lombe, Cas. t. Hard. 307; R. *v.* Derby, 7 A. & E. 419.

(*c*) R. *v.* York, 4 T. R. 699; 5 T. R. 66; cf. R. *v.* Colchester, 2 T. R. 259. A mandamus would also be granted to admit the deputy of a recorder, if the recorder could establish his right to appoint a deputy, R. *v.* St. Alban's, 12 East, 559.

(*d*) Thompson *v.* Goodfellow, 2 Show. 173.

(*e*) R. *v.* Woodrow, 2 T. R. 731; Papilion & Dubois, Skin. 64.

(*f*) Anon., Sty. 355.

(*g*) Knipe *v.* Edwin, 4 Mod. 281; R. *v.* Bailiffs of Ipswich, 1 Barn. 407; R. *v.* Clitheroe, 6 Mod. 133; Vaughan *v.* Lewis, Carth. 227.

(*h*) R. *v.* Bridgnorth, 1 Barn. 53.

(*i*) Emery *v.* Malmesbury, 3 Q. B. 577; 4 Jur. 222.

(*k*) R. *v.* Beaufort, 5 B. & Ad. 442; R. *v.* Midhurst, 1 Wils. 283; cf. R. *v.* West Looe, 3 B. & C. 677. As to burgesses, see now 45 & 46 Vict. c. 50, s. 47, and under the heading "Municipal Corporations," *post*, p. 323 *et seq.*

(*l*) R. *v.* Oakhampton, 1 Wils. 332; Wannel *v.* Cam. Civ. London, 1 Str. 675; Townsend's case, 1 Keb. 458; R. *v.* Bosworth, 2 Str. 1112; R. *v.* Harrison, 3 Burr. 1322; R. *v.* Ludlam, 8 Mod. 267; R. *v.* Kingston-upon-Hull, 11 Mod. 382; R. *v.* Lincoln, 12 Mod. 190; Wright *v.* Fawcett, 4 Burr. 2041; cf. R. *v.* Eye, 1 R.

tion (*m*) ; a constable (*n*) ; scavengers (*o*) ; a port-reeve (*p*); to admit an attorney to practise in an inferior Court of law (*q*), at any rate where there was no ancient usage or custom limiting the number (*r*) ; a notary (*s*); a registrar of an archdeacon (*t*); a deputy registrar of an archbishop's court (*u*); clerk of the peace (*x*); town clerk (*y*); clerk to the land tax commissioners (*z*); clerk of the fines in the marches of Wales (*a*); clerk of trustees under the General Turnpike Acts (*b*); and the same would now be held in the case of a clerk to a board of guard-[★ 282] ians (*c*); church-wardens (*d*); and ★ sides-

& C. 85 ; R. *v.* Norris, 1 Barn. 385 : Moore *v.* Hastings, Cas. t. Hard. 353; R. *v.* Doncaster, 7 B. & C. 630. But a mandamus to the inquiry jury of a borough to present two persons to be freemen was refused, Holt, C.J., saying, "We'll grant a mandamus to him who is to admit, but not to them who are to present on oath the truth of a fact ; not to a jury."—Case of Borough of Clithero. Comb. 239.

(*m*) R. *v.* Rye, 2 Burr. 798.

(*n*) Anon., Comb. 285; Anon., 2 Barn. 129.

(*o*) *Per* Lord Mansfield, R. *v.* Barker, 3 Burr. 1267.

(*p*) R. *v.* Williams, Sayer, 140; also the ale taster to a borough, where his appointment as such appeared to be a previous requisite to his being chosen portreeve, the portreeve being the returning officer for Members of Parliament. Ravenhil's case, Str. 608.

(*q*) *Per curiam*, Lee's case, Carth. 169; *per* Holt, C.J., White's case, 6 Mod. 18 ; Anon., March. 141 ; Gillman *v.* Wright, Sid. 410. See R. *v.* Mayor, &c., of London, 13 Q. B. 1: the absence of a roll to be signed by the attorney being considered in this case no objection: a roll should be procured in such inferior courts as had not one.

(*r*) R. *v.* Sheriffs of York, 3 B. & Ad. 770.

(*s*) R. *v.* Scriveners, 1 G. & D. 641; 3 G. & D. 272; 10 B. & C. 511.

(*t*) Lambert's case, Carth. 170; 1 Show. 253.

(*u*) R. *v.* Ward, 1 Barn. 252, 294, 380, 411 ; 2 Str. 893. But this was against the will of Holt, C.J.; see White's case, 6 Mod. 18, and cf. R. *v.* Gloucester, 2 B. & Ad. 158.

(*x*) R. *v.* Surrey, Sayer, 144.

(*y*) R. *v.* Slatford, 5 Mod. 316 ; R. *v.* Hereford, 6 Mod. 309; Town Clerk's case, Comb. 244 ; R. *v.* Knapton, 2 Keb. 445 ; Audly's case, Latch. 123.

(*z*) R. *v.* Thatcher, 1 D. & R. 426.

(*a*) Dolben's case, 1 Keb. 872, 881. A mandamus was also granted to admit the deputy secretary of the Court of the Marches, R. *v.* Clapham, 2 Keb. 738.

(*b*) R. *v.* Cheshunt, 5 B. & Ad. 438.

(*c*) R. *v.* St. Martin's, 17 Q. B. 149.

(*d*) *Ex parte* Winfield, A. & E. 614; R. *v.* Raines, 3 Salk. 233; R. *v* Williams, 8 B. & C. 681; Anon., 2 Chitt. 254; R. *v.* Harris, 3 Burr. 1420; Hubbard *v.* Penrice, 2 Str. 1246 ; R. *v.* Simpson, 1 Str. 609; R. *v.* Rice, 5 Mod. 325; R. *v.* White, 8 Mod. 325 ; R. *v.* Rees, 12 Mod. 116 ; R. *v.* Chester, 1 A. & E. 342 ; R. *v.* Middlesex, 3 A. & E. 615; *Ex parte* Lowe, 4 Dowl. 15; Morgan *v.* Cardigan, 1 Salk. 166 ; King's case, 1 Keb. 517 ; Northampton case,

men (*e*); a chapelwarden (having under a local Act the power of a churchwarden for the purposes of the chapel) (*f*); a trustee of the poor of a parish (*g*); overseers of the poor (*h*); parish clerk (*i*); sexton (*k*); a commissioner under a local drainage Act (*l*); registrar of the Bedford Level Corporation (*m*); a director of a chartered company (*n*); liveryman of a city company (*o*); freeman of the company or fraternity of freemasons of a city (*p*), or of a company of free fishermen and dredgemen (*q*), or of the company of coopers of a town (*r*).

As to a degree at a university, it was said by the Court, in *R.* v. *University of Cambridge* (*s*), that if a degree were denied to a man who had performed all his exercises for it, a mandamus would be granted to admit him; and it is stated in an old report (*t*) that a mandamus was granted to make a Master of Arts.

★ The Court has refused a mandamus to [★ 283] admit or swear in in the following cases, viz: to admit to an Inn of Court (*u*); or to such a body as Barnard's

Cases in which mandamus to admit has been refused.

Carth. 118; R. *v.* Rees, Carth. 393; R. *v.* Commissary, &c., of Bishop of Winchester, 7 East, 573; R. *v.* Henchman, Cas. t. Hard. 130. "Churchwardens cannot have a mandamus unless elected by custom, and not by the canon or the parson."—2 Keb. 67.

(*e*) R. *v.* Middlesex, 3 A. & E. 615.

(*f*) *Ex parte* Duffield, 3 A. & E. 617.

(*g*) R. *v.* St. Mary Abbots, 2 B. & Ad. 740.

(*h*) R. *v.* Manchester, 7 Dowl. 707.

(*i*) Clerk of St. Dunstan's case, Comb. 105; *per* Twysden, J., 2 Keb. 168; *per* Keeling, C.J., id. 172; and the cases cited in Dolben's case, 1 Keb. 881. See also 2 Barn. 53.

(*k*) *Per* Lord Mansfield, R. *v.* Barker, 3 Burr. 1267; Nightingale *v.* Marshall, 3 D. & R. 549; Anon., 7 Mod. 118.

(*l*) R. *v.* Kelk, 12 A. & E. 559; 1 Q. B. 660; cf. R. *v.* Prin, 1 Keb. 609, 686.

(*m*) R. *v.* Bedford Level Corporation, 6 East, 356.

(*n*) Anon., 2 Str. 696.

(*o*) Taverner's case, Sir T. Ray. 446. As to admission to the Scriveners' Co., see R. *v.* Scriveners' Co., 10 B. & C. 511; to the Russian Co., De la Costa *v.* Russian Co., 1 Barn. 24; to the Turkey Co., R. *v.* Turkey Co., 2 Burr. 943; to the Company of Armourers and Braziers, Smith *v.* Armourers and Braziers, 1 Peake, N. P. 199; to the Gunmakers' Co., R. *v.* Gunmakers' Co., W. Kelynge, 280; to the Skinners' Co., R. *v.* Oxenden, *arguendo*, 1 Show. 219.

(*p*) Green *v.* Mayor of Durham, 1 Burr. 127; see R. *v.* Hostmen of Newcastle, 2 Str. 1223. These freemasons were a local guild and not, it need scarcely be said, a branch of the great society of free and accepted masons.

(*q*) R. *v.* Tappenden, 3 East, 186.

(*r*) R. *v.* Newcastle, 7 T. R. 543.

(*s*) R. *v.* University of Cambridge, 8 Mod. 151, the case of Dr. Bentley.

(*t*) R. *v.* Patrick, 2 Keb. 66.

(*u*) R. *v.* Lincoln's Inn, 4 B. & C. 855.

Inn (*x*); or to the degree of barrister-at-law (*y*); or to be an advocate of the Court of Arches (*z*); or as member of the College of Physicians (*a*); or a person who has a remedy by *quare impedit* (*b*); or to the office of chaplain of a college, where there is a visitor (*c*); or to a lectureship if unendowed or dependent on voluntary contributions, or where the rector may refuse the use of the pulpit (*d*); or to the post of surgeon to a hospital (*e*); or the steward of a court baron (*f*); or bailiff of a manor (*g*); or to admit a deputy of a parish clerk (*h*): or to swear in a serjeant-at-mace, where he is an officer dative and removable at the pleasure of the mayor (*i*).

A mandamus to swear in has been refused after a judgment ouster obtained against the applicant. The Court must take such judgment as good so long as it is unreversed (*k*).

Mandamus to restore to office.

"A mandamus to restore," says Lord Mansfield, "is the true specific remedy where a person is wrongfully dispossessed of any office or function which draws after it temporal rights, in all cases where the established course of law has not provided a specific remedy by another form of proceeding" (*l*).

A mandamus to restore to actual possession of an office is, however, granted only where the official has already had actual possession of it: if he has not had actual possession of it, a mandamus will only be granted [★ 284] to give him legal possession of it, not ★ actual possession (*m*). The reason why, in such a case, the Court does not meddle with the actual possession

(*x*) R. *v.* Barnard's Ind, 5 A. & E. 17.
(*y*) R. *v.* Gray's Inn, Doug. 353.
(*z*) R. *v.* Archbishop of Canterbury, 8 East, 213.
(*a*) R. *v.* College of Physicians, 7 T. R. 282; R. *v.* Askew, 4 Burr. 2186; R. *v.* College of Physicians, 2 Show. 178; and see Dr. Goddard's case, 1 Keb. 75, 84.
(*b*) See per Lord Kenyon, C.J., R. *v.* Stafford, 3 T. R. 651; Ken's case, cited 1 Keb. 835.
(*c*) R. *v.* Chester, 2 Str. 797.
(*d*) R. *v.* Bishop of London, 1 Wils. 11; R. *v.* Same, 1 T. R. 331; R. *v.* Same, 13 East, 419; R. *v.* Archbishop of Canterbury, 15 East, 117, R. *v.* Bishop of Oxford, 7 East, 345; R. *v.* Bishop of Exeter, 2 East, 462; R. *v.* Field, 4 T. R. 125.
(*e*) Anon., 7 Mod. 118.
(*f*) Per Eyres, J., Speaker & Styant, Comb. 127.
(*g*) *Per curiam*, Comb. 133.
(*h*) Parish Clerk's case, Lofft, 434.
(*i*) R. *v.* Winter, 2 Keb. 134. See and distinguish R. *v.* Barnard, 2 Keb. 402.
(*k*) R. *v.* Serle, 8 Mod. 332, 335.
(*l*) R. *v.* Blooer, 2 Burr. 1045.
(*m*) R. *v.* D. & C. of Dublin, 1 Str. 536.

is, according to Pratt, C.J., "because when we have given him the legal possession, he is by law as much entitled to every right belonging to the office as if he had the actual possession, and may maintain that right without our assistance, even against another who is in possession of the office" (*n*).

From very early times we find many instances of mandamus to restore to the office of alderman (*o*); also to that of town councillor (*p*); burgess (*q*); common burgess (*r*); capital burgess (*s*); in burgess (*t*); citizen (*u*); capital citizen (*x*); freeman of a borough (*y*); one of the approved men of Guildford (*z*); steward of a corporation (*a*); a constable (*b*); a serjeant-at-mace, where the office was ★ one for life (*c*); [★ 285]

(*n*) Ib. 538.

(*o*) Haddock's case, 1 Sir T. Ray, 435; R. *v.* Canterbury, 1 Lev. 119; R. *v.* The Bailey, &c., of Brecknock, 1 Keb. 33; Wigon *v.* Pilkington, 1 Keb. 597; Crips *v.* Mailstone, 1 Keb. 812; R. *v.* Rippon, 2 Keb. 15; R. *v.* Stafford, 2 Keb. 264; R. *v.* Brayfield, 2 Keb. 488; R. *v.* Jay, 3 Keb. 714; R. *v.* Sanchar, 2 Show. 66; Enfield *v.* Hills, Sir T. Jones, 116; R. *v.* Thacker, Id 121; R. *v.* Shrewsbury, 2 Barnard. 394; 7 Mod. 201; R. *v.* Doncaster, Say. 37; Exeter *v.* Glide, 4 Mod. 33; Smith's case, 4 Mod. 53. R. *v.* Leicester, 4 Burr. 2087; R. *v.* Andover, 3 Salk. 229; R. *v.* Taylor, 3 Salk. 231. As to a mayor, see Mayor of Durham's case, 1 Sid. 33.

(*p*) Styles, 32; R. *v.* Tyther, 2 Keb. 250; William's case, 2 Keb. 538; Anon., 2 Salk. 436; R. *v.* Coventry, 2 Salk. 430; R. *v.* Raines, 3 Salk. 233; R. *v.* Liverpool, 2 Burr. 723; R. *v.* Chester, 5 Mod. 10; R. *v.* Chichester, 1 Show. 273; R. *v.* Oxford, 6 A. & E. 349.

(*q*) Bagg's case, 11 Rep. 94; Clerk's case, Cro. Jac. 506; R. *v.* Philingham, 1 Keb. 777; R. *v.* Tidderley, 1 Sid. 14; R. *v.* Wilton, 5 Mod. 257; R. *v.* Chalk, Comb. 396; R. *v.* Pomfret, 10 Mod. 107; R. *v.* Truebody, 11 Mod. 75; R. *v.* Shaw, 12 Mod. 113; R. *v.* Derby, 2 Salk. 436; R. *v.* Dover, 11 Q. B. 260.

(*r*) R. *v.* Buckingham, 10 Mod. 173.

(*s*) R. *v.* Aldborough, 10 Mod. 100, 1 Keb. 308, See case of Devises, 2 Keb. 725; R. *v.* Vicars, 11 Mod. 214; R. *v.* Lane, 11 Mod. 270; R. *v.* Carlisle, 11 Mod. 378; R. *v.* Gloucester, Holt, 450; R. *v.* Ryme Regis, 1 Doug. 79, 177.

(*t*) R. *v.* Holmes, 3 Burr. 1641.

(*u*) Middleton's case, 3 Dy. 332 b.

(*x*) R. *v.* Carlisle, Fort. 200.

(*y*) Proctor *v.* Kingston-upon-Thames, Sty. 477; R. *v.* Derby, Cas. t. Hard. 153.

(*z*) 1 Lev. 162; cf. Anon., 2 Mod. 316, with R. *v.* Dean of Exeter, 2 Show. 217.

(*a*) R. *v.* Halse, 1 Keb. 20; Blagrave's case, 2 Sid. 6, 49, 72. Distinguish Dighton *v.* Stratford-on-Avon, 1 Sid. 461, where the office was held *durante bene placito*.

(*b*) *Per* Twysden, J., Anon., Free. 21. Cf. Sty. 42, 2 Lev. 16; Noy. 78; 1 Bulst. 174; Middleton's case, 3 Dy. 332 b., 28.

(*c*) R. *v.* Barnard, 2 Keb. 402; R. *v.* Dartmouth, 3 Salk. 229; Anon., Comb. 287.

a sword bearer to a corporation (*d*); a recorder (*e*); clerk of the peace (*f*); town clerk (*g*); jurat (*h*); an attorney of an inferior Court (*i*); the attorney of a corporation (*k*); an attorney within the liberty of St. Martin's-le-Grand (*l*); steward of a court leet (*m*); curate of a chapel donative (*n*); minister of an endowed dissenting chapel (*o*); master of an endowed grammar school (*p*), and an under-master (*q*); registrar of a bishop's court (*r*); registrar of an archdeacon (*s*); churchwarden (*t*), sexton, at any rate where it is an

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(*d*) R. *v.* Bristol, 1 Show. 288.

(*e*) R. *v.* Wells, 4 Burr. 1999; Basset *v.* Barnstaple, 1 Sid. 286; Bath *v.* Hawley, 2 Keb 770, 796; R. *v.* Corye, Sty. 86; Prin's case, 1 Keb. 520, 541; R. *v.* Holt, 3 Keb. 667; Protector *v.* Colchester, Sty. 446; R. *v.* Cambridge, 2 Show. 69; Whiteacre's case, 11 Mod. 67; R. *v.* Canterbury, 11 Mod. 403.

(*f*) R. *v.* Evans, 1 Show. 282.

(*g*) R. *v.* Stratford-upon-Avon, 1 Lev. 291, 2 Keb. 641, 656; R. *v.* Gloucester, 2 Show. 504; R. *v.* Durham, 10 Mod. 146; R. *v.* Oxon, 2 Salk. 428; R. *v.* Axbridge, 2 Cowp. 523; Verrior *v.* Sandwich, 1 Sid. 305; R. *v.* Campion, 1 Sid. 14, 2 Sid. 97.

(*h*) Anon., 1 Lev. 148.

(*i*) Hurst's case, 1 Sid. 94, 152, 1 Keb. 558 (City Court of Canterbury); Underwood's case, cited 1 Sid. 94 (the Marshalsea Court); R. *v.* Sheriff of York, 2 Show. 154; Parker's case, 1 Vent. 331 (the Court of the County Palatine of Chester).

(*k*) R. *v.* Colchester, 2 Keb. 188.

(*l*) Collin's case, 1 Keb. 549.

(*m*) Middleton's case, 1 Sid. 169; *per* Glyn, C.J., 2 Sid. 112; R. *v.* Kingscleere, 2 Lev. 18; Hurst's case, 1 Keb. 354; R. *v.* Raines, 3 Salk. 233; Protector *v.* Craford, Sty. 457; *per* Lord Mansfield, 3 Burr. 1659. A different view of the office was taken in the following cases: Anon., 12 Mod. 666; Stamp's case, 1 Sid. 40, 1 Keb. 5.

(*n*) R. *v.* Blooer, 2 Burr. 1043. See further as to curates, R. *v.* Oxford, 7 East, 345, 600; R. *v.* London, 15 East, 117, 133; R. *v.* Stafford, 3 T. R. 646; Faulkner *v.* Elger, 6 D. & R. 517, and *per* Lord Mansfield in Powel *v.* Milbank, 1 T. R. 401, note.

(*o*) *Per* Lord Kenyon, R. *v.* Jotham, 3 T. R. 577; *per* Lord Denman, R. *v.* Abrahams, 4 Q. B. 160.

(*p*) R. *v.* Darlington, 6 Q. B. 682; *per curiam*, Parkinson's case, Comb. 144; Hermitage's case, Comb. 210. The office of schoolmaster disputes with that of sexton, the distinction of being the lowest in respect of which a mandamus would be granted. Cf. 1 Keb. 631 with 2 Keb. 862. Some of the older cases are against granting a mandamus in the case of a schoolmaster; see Protector *v.* Craford, Sty. 457, referred to R. *v.* Patrick, 1 Keb. 835; *per curian*, R. *v.* Raines, 3 Salk. 233; Pollice's case, cited 2 Barn. 366.

(*q*) R. *v.* Morpeth, 1 Str. 58.

(*r*) Anon., Comb. 264; *sed vide*, *per* Holt, C.J., Anon., 12 Mod. 666.

(*s*) See Ruding *v.* Newell, 2 Str. 983; Lambert's case, Carth. 170.

(*t*) *Per* Glyn, C.J., Sty. 457; *per curiam*, 3 Mod. 335.

office for life (*u*); parish ★ clerk (*x*); col- [★286] lector of rates (*y*); clerk to turnpike commissioners (*z*); clerk to a board of guardians (*a*); scavengers (*b*); as member and assistant of the Company Traders to the Bermudas (*c*); as member of the court of assistants of the Cutler's Company (*d*); assistant of the Sadlers' Company (*e*); a freeman of the Company of Free Fishermen and Dredgemen of Faversham (*f*); and of Whitstable (*g*); a brother of the Trinity House at Hull (*h*); to the office of Governor of Bridewell in the City of London (*i*); receiver of the Bedford level (*k*); surveyor of the New River water (*l*), and its treasurer (*m*); clerk or surveyor of city works (*n*); clerk of Masons' Company (*o*); deputy of the secretary to the Court of Marches (*p*); to the ancient annual office (in the gift of the Court of Common Council) of Clerk and Comptroller of the Bridge House Estates (*q*); to the office of master-weigher of the kings' beam (*r*); woodward of the City of London (*s*); and yeoman of the wood wharf (*t*).

A mandamus to restore has been refused in the case

(*u*) R. *v.* Kingscleere, 2 Lev. 18 *per curiam*, R. *v.* Raines, 3 Salk. 233; R. *v.* St. James, Taunton, 1 Cowp. 413; Ile's case, 1 Vent. 143; see R. *v.* Stoke Damarel, 5 A. & E. 584; see note (*p*) *supra*.

(*x*) R. *v.* Warren, 1 Cowp. 370; R. *v.* Davies, 9 D. & R. 234; *Ex parte* Cirkett, 3 Dowl, 327; R. *v.* Gaskin, 8 T. R. 209; R. *v.* Smith, 5 Q. B. 614; Anon., 2 Chitt. 254; Kido *v.* Watkinson, 11 Mod. 221; see also id. 261, and *per* Glyn, C.J., 2 Sid. 112.

(*y*) R. *v.* Christchurch, 7 E. & B. 409, 421.

(*z*) R. *v.* Wrexham, 5 A. & E. 581.

(*a*) R. *v.* St. Martin's, 17 Q. B. 149; 20 L. J. Q. B. 423. A different view formerly prevailed, see R. *v.* St. Nicholas, Rochester, 4 M. & S. 324; R. *v.* Dodgelly, 8 A. & E. 561.

(*b*) *Per curiam*, Ile's case, Vent. 143. See *Per curiam*, R. *v.* Mayor of London, 2 T. R. 181.

(*c*) Trott's case, 2 Keb. 693.

(*d*) R. *v.* Company of Cutler's, Cas. t. Hard. 129.

(*e*) R. *v.* Sadler's Co., 3 E. & E. 42; 4 B. & S. 570; 10 H. L. Cas. 404.

(*f*) R. *v.* Faversham, 8 T. R. 352.

(*g*) R. *v.* Whitestable, 7 East, 353.

(*h*) Bagwell *v.* Jobson, 1 Barn. 144.

(*i*) R. *v.* Boulton, 3 Keb. 464.

(*k*) Anon., 1 Barn. 195.

(*l*) Referred to, Comb. 347.

(*m*) See R. *v.* Raines, 3 Salk. 233; R. *v.* New River, 1 Keb. 629.

(*n*) 2 Sid. 112; 2 T. R. 182, n.; R. *v.* London, 2 Barn. 398.

(*o*) Stamp's case, Comb. 348.

(*p*) R. *v.* President, &c., of the Marches, 1 Lev. 306.

(*q*) R. *v.* Mayor, &c., of London, 2 T. R. 177.

(*r*) See 1 Barn. 123, 135.

(*s*) Ib.

(*t*) Case of Shriven and Turner, 2 Str. 832.

Cases where mandamus to restore refused.

of a canon (*u*), and also a chorister of a cathedral (*x*) [★ 287] and the master ★ of a grammar school annexed to it (*y*), the bishop being in all these cases visitor; in the case of a college chaplain, where there is a visitor (*z*); a fellow or master of a college, where there is a visitor (*a*); a barrister (*b*); a proctor (*c*); a fellow of the College of Physicians (*d*); surgeon of a hospital (*e*); Clerk to the Company of Butchers, alleged to be a chartered office in which the applicant had a freehold (*f*); clerk to justices (*g*); clerk to a Dean and Chapter (*h*); clerk in the office of *Custos Brevium* (*i*); a charterhouse, bluecoat or other almsman or almswoman (*k*); a vestry clerk (*l*); approver of guns to the Gunmakers' Company (*m*); water bailiff of the Severn (*n*); master of the Lord Mayor's water house (*o*); and formerly, but not now, in the case of a clerk to poor law guardians (*p*).

In the case of Dr. Bentley, a mandamus was granted to the University of Cambridge, to restore him to the degrees from which he had been degraded on the ground of alleged contumacy (*q*). But, as observed by Lord Kenyon in a later case (*r*), it was intimated in that case that if the Bishop of Ely had acted as general visitor, the Court would not have entered into a discussion of the case below; and further, in that case the principles of the law had been violated; Dr. Bentley

(*u*) R. *v.* Bishop of Chester, 1 W. Bl. 22; 1 Wils. 206.
(*x*) R. *v.* Chester, 15 Q. B. 513.
(*y*) R. *v.* Rochester, 17 Q. B. 1.
(*z*) Prohurst's case, Carth. 168.
(*a*) Appleford's case, 1 Mod. 82; 2 Keb. 864; Parkinson's case, 3 Mod. 265; Comb. 143; Witherington's case, 1 Sid. 71; 1 Lev. 23; Robert's case, 2 Keb. 102, 864; Patrick's case, 1 Lev. 65; 1 Keb. 289, 294, 298, 551, 610; 2 Keb. 167.
(*b*) See Boreman's case, cited Sty. 457.
(*c*) R. *v.* Oxenden, 1 Show. 217; 3 Mod. 332.
(*d*) Goddard's case, 1 Keb. 75, 84.
(*e*) Anon., Comb. 41.
(*f*) White's case, 6 Mod. 18.
(*g*) *Ex parte* Sandys, 4 B. & Ad. 863.
(*h*) Comb. 133.
(*i*) Whitechurch *v.* Pagot, Sty. 208.
(*k*) R. *v.* Wheeler, 3 Keb. 360.
(*l*) R. *v.* Croydon, 5 T. R. 713.
(*m*) Vaughn *v.* Gunmaker's Company, 6 Mod. 82.
(*n*) Comb. 347.
(*o*) See Ile's case, 1 Vent. 143. As to workmen in the mint and moneyer of the mint, see Stirling's case, 1 Sid. 304; 2 Keb. 91.
(*p*) R. *v.* St. Nicholas, Rochester, 4 M. & S. 324; *sed vide* R. *v.* Dolgelly Union, 8 A. & E. 561; see now R. *v.* St. Martin's, 17 Q. B. 149; 20 L. J. Q. B. 423.
(*q*) R. *v.* Cambridge, 8 Mod. 148.
(*r*) R. *v.* Cambridge, 6 T. R. 104.

had been condemned without being heard; and the whole mode of proceeding in his case was improper (*s*).

★ In the case before Lord Kenyon, the [★ 288] Court refused a mandamus to restore, to the franchises of a resident master of Arts, a person banished from the University by the Vice-Chancellor and Heads of Colleges in the Vice-Chancellor's Court, for an offence against certain statutes of the University. "It seems to me," said Lord Kenyon, "that offences against the statutes alluded to were intended to be cognizable in the Vice-Chancellor's Court; and if there be any errors in the proceedings of that Court, they should be rectified in the Court of Appeal in the University" (*t*).

And the authorities are numerous to the effect that where there is a proper visitor, his sentence, in a matter in which he is not disqualified to act by interest, given after hearing the parties concerned, is conclusive; and the Court will not interfere with it in any way by mandamus (*u*).

It is clear that a visitor has jurisdiction to restore after amotion; and where that is so, the application for restoration must be made to him (*x*).

As to the unfounded contention that a college visitor has jurisdiction only in the case of a person who has been admitted, vide *ante* p. 278, and the cases there referred to in note (*i*).

But, according to Lord Hardwicke, "if the parties concerned do not shew that there is a visitor, the Court cannot take notice that there is, because all visitatorial powers are of a private nature, and there is no difference whether that power be in the Crown or

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(*s*) 6 T. R. 107. According to Lord Hardwicke, it did not appear in Dr. Bentley's case that there was a visitor. (See Cas. t. Hard. 218). It would seem that in 5 Edward II., certain scholars of the order of the predicants obtained a mandamus from the king to be allowed the privileges of the university from which they had been excluded. See *arguendo* in Patrick's case, Sir T. Ray. 110. See also Baketon's case, cited id. 109. On these early cases, see the remarks of Windham, J., 2 Keb. 167.

(*t*) 6 T. R. 105.

(*u*) See Walker's case, Cas. t. Hard. 212; *Ex parte* Buller, 1 Jur. N. S. 709; Parkinson's case, Carth. 92. On the same ground a mandamus to restore abbots, priors, or monks, though granted in early times (see *per* Windham, J., in Middleton's case, 1 Sid. 169), was refused in later times, as they had visitors who could give an adequate remedy. See *arguendo* Leigh's case, 3 Mod. 334, and R. *v.* London Waterworks, 1 Lev. 123; Philips & Bury, Skin. 447, 2 T. R. 346; R. *v.* Apleford, 2 Keb. 861; R. *v.* St. Catherine's Hall, 4 T. R. 233; R. *v.* Ely, 2 T. R. 290.

(*x*) See *per curiam*, R. *v.* Chester, 15 Q. B. 518; and Appleford's case, 1 Mod. 82.

[★ 289] ★ in a subject; for it is a private right in either; and in such case a mandamus must of necessity be granted, as well where the Crown as where the subject is concerned" (*y*).

As to the steward of a Court baron, the reported *dicta* are conflicting (*z*).

A mandamus will not be granted to restore a person irregularly removed where there is power, immediately after restoration, to remove him in a formal manner (*a*); or, in case of an annual officer, after the expiration of his year of office (*b*).

If a person is merely suspended illegally from his office, he is still in possession, and it seems that a mandamus to restore will not be granted (*c*); and the Court has always looked more strictly to the right of a person applying to be restored than to that of a person applying to be admitted (*d*).

To deprive.

A mandamus has never been granted to deprive of an office (*e*).

Effect of mandamus to admit or swear in.

It only remains to add that a mandamus to swear in [★ 290] or admit to ★ an office confers no title to the office. "It is the confirmation of the party's title, if he have one; but it gives him none" (*f*).

(*y*) Cas. t. Hard. p. 218. In the case before Lord Hardwicke the writ itself shewed that the Bishop of Ely was visitor. Cf. *per* Hales, C.J., 2 Keb. 863.

(*z*) Against granting a mandamus in such a case are Stamp's case, 1 Keb. 5; 1 Sid. 40; Middleton's case, 1 Sid. 169; Hurst's case, 1 Keb. 354; *per* Eyres, J., Speaker *v.* Styant, Comb. 127. See also Anon., 12 Mod. 666. In favour of granting it are: *Per* Hale C.J., Isle's case, 2 Keb. 820; and *per* the same judge as reported in Anon., Free. 21, and R. *v.* Kingscleere, 2 Lev. 18.

(*a*) R. *v.* Griffiths, 5 B. & Ald. 731. R. *v.* Axbridge, 2 Cowp. 523; R. *v.* Mayor, &c., of London, 2 T. R. 177; Basset *v.* Barnstable, 1 Sid. 286. In R. *v.* Ward, 1 Barn. 295, a different view was taken by the Court. They said that mandamuses had been granted to restore officers at will, though they might the next instant be removed absolutely; that was the very case of Serjeant Whitacre: He was recorder at will; the town of Ipswich illegally removed him; a mandamus was granted to restore him; and immediately after they obeyed the writ they deprived him again.

(*b*) Mayor of Durham's case, 1 Sid. 33.

(*c*) See R. *v.* Freefishers of Whitstable, 7 East, 353; R. *v.* Mayor of London, 2 T. R. 177, 182; R. *v.* Tyther, 2 Keb. 250; *sed vide* R. *v.* Guildford, 1 Keb. 868, 880; 2 Keb. 1.

(*d*) See 1 W. Bl. 25, note (*o*) and cases there referred to.

(*e*) R. *v.* Gower, 3 Salk. 230. The Court seems to have had some doubt about this case, and to have ultimately refused the writ on the ground that the fellows, whom it was sought to remove, had not been made parties. See the report (*nom.* R. *v.* St. John's College, Cambridge), Comb. 279; 4 Mod. 233; cf. R. *v.* Totness, 5 D. & R. 481, and R. *v.* West Looe, id. 414: R. *v.* Portsmouth, 3 B. & C. 152.

(*f*) *Per* Lord Kenyon, R. *v.* Clarke, 2 East, 83.

As to all the offices referred to in this chapter, the distinction between the cases in which a mandamus will be granted and those in which the remedy is by *quo warranto*, should be carefully borne in mind. See the observations on p. 124, *ante*.

Distinction between remedy by mandamus and by *quo warranto*.

Notwithstanding some want of precision in the authorities, the rule appears now to be established, that the validity of the title to an office, of which one person is in actual possession under a *bonâ fide* though illegal election, *i.e.*, under an election which is not merely colourable, cannot be tried by mandamus. If another person claims the office on the ground that he had the majority of legal votes, he must proceed by *quo warranto* to oust the actual occupant, before he can obtain a mandamus to enforce (if necessary) his own admission. In one case, indeed (*g*), where two persons claimed to have been legally elected as recorder, and the corporation had certified the election of one to the Secretary of State for the approbation of the Crown, the Court thought it a proper case for a mandamus to the corporation to put the corporate seal to the election of the other; but this was said, in a subsequent case (*h*), to have proceeded on the ground that the office was not full *de facto* of either party, the Crown not having signified its approbation; and the certificate was only a step towards the completion of the title. In a previous case (*i*), dealing also with the office of recorder, the Court refused a mandamus to the party claiming the majority of legal votes; being clearly of opinion that his remedy was by *quo warranto* (*k*).

No very precise test of a merely colourable as distinguished from an illegal election can be extracted from the cases.

★ In some of the earlier cases a mandamus [★ 291]

(*g*) R. *v.* Mayor of York, 4 T. R. 699.

(*h*) R. *v.* Mayor of Oxford, 6 A. & E. 354.

(*i*) R. *v.* Mayor of Colchester, 2 T. R. 259. See also R. *v.* Bedford, 1 East, 79; R. *v.* Turner, Sir T. Jones, 215; R. *v.* Hertford College, L. R. 3 Q. B. D. 693. See also R. *v.* Reynolds, 1 Ir. C. L. R. N. S. 158. The rights of the voters will not be examined, R. *v.* Dolgelly, 8 A. & E. 561.

(*k*) The reason why, as a general rule, a mandamus will not lie to proceed to a new election, before a *quo warranto* is issued to avoid an election *de facto* followed by admittance is, according to Willes, J. (R. *v.* Saddlers' Co., 10 H. L. Cas. 431, 432), that upon a mandamus to proceed to a new election the person who is in the office has no opportunity of being heard; and in order to give him an opportunity of being heard, and for no other reason, a *quo warranto* is necessary.

was granted merely on the ground that the election was void (*l*).

In a later case (*m*) Lord Mansfield said that if an officer were actually sworn in, the Court might think it proper that his right should be tried first, or if the election were doubtful or questionable; but otherwise if they saw clear that there was only a colourable election.

Where an action to determine the respective rights of two claimants to an office had ended in a determination that neither had been duly elected; and another election was held, at which one of the two claimants was elected, without notice of the intended election to the friends of the other candidate, a mandamus to hold another election was granted (*n*).

Where a person who was known to have gone to America was elected mayor, in order that the old mayor might hold over, the election was held merely colourable (*o*).

The irregular and disorderly manner in which an election of churchwardens was held, induced the Court in one case to hold it void, and to grant a mandamus for a new election (*p*).

But the fact that, at an election, admissible votes were rejected, would not suffice to make the election void; at any rate where it is not shewn that the result of the election was affected thereby (*q*). Neither would a wrongful counting of the votes, followed by a declaration of the persons so elected (*r*). In both these cases the office would be full *de facto*, and the remedy, if any, would be by *quo warranto*.

The principles above stated have also been applied to a case where the charter of a borough directed that, when it should happen that any of the capital burgesses should dwell out of the borough, it should be lawful for the remainder to elect others into their place. [★ 292] ★ It was argued that, as the power of amotion existed, it would be a useless ceremony to make it necessary for the corporation (who stated their readi-

(*l*) Case of Aberystwith, 2 Str. 1157; Case of Bossiny, 2 Str. 1003; R. *v.* Newsham, Say. 211.

(*m*) R. *v.* Cambridge, 4 Burr. 2010; R. *v.* Bankes, 3 Burr. 1454. See R. *v.* Beedle, 3 A. & E. 467.

(*n*) R. *v.* St. Martin-in-the-Fields, 1 T. R. 146.

(*o*) R. *v.* Cambridge, 4 Burr. 2008.

(*p*) R. *v.* Birmingham, 7 A. & E. 254.

(*q*) *Ex parte* Mawey, 3 E. & B. 718.

(*r*) R. *v.* Winchester, 7 A. & E. 215. See also R. *v.* Derby, 7 A. & E. 419.

ness to consent to any rule) to do a mere formal act prior to the granting of the mandamus; but the Court would not depart from the general practice not to grant a mandamus to elect, unless the party in possession of the office were previously amoved from it (*s*).

A person may be elected to, and in actual possession of, an office, though his election has been obtained by a false and fraudulent statement made by him; and he cannot be lawfully removed from it without being heard in his defence (*t*).

Where the returning officer at a municipal election under the Ballot Act, 1872, declared a person duly elected councillor who had not the majority of votes, on the ground that his competitor was disqualified for election by the fact that he was at the time an alderman; and the person so declared elected made and subscribed the declaration of acceptance of office required by sect. 35 of the Municipal Corporations Act, 1882, he was considered by the present Master of the Rolls (*u*) not to have been properly elected either in form or substance; and in the opinion of the Court of Appeal he did not obtain *de facto* possession of the office (*x*).

Another distinction is to be observed. If a person has in due form been declared elected by the proper officer, he is from that moment in *de facto* possession. Should another person be subsequently declared elected on the ground of a supposed error in counting the votes, the person first declared elected is entitled to a mandamus; the proceedings subsequent to the declaration of his election being merely void (*y*).

And the Court will grant a rule absolute for a mandamus to compel the swearing in of the person actually elected, though the validity of the election is questioned; the validity not being a matter which will be considered at this stage (*z*). A mandamus to restore such a person has also been granted (*a*).

★ Further, if the person who had the [★ 293] greatest number of votes was disqualified and ineligible (*e.g.*, a mayor, whilst such, to be elected town councillor), a mandamus would be granted to admit the

(*s*) R. *v.* Truro, 3 B. & Ald. 590.
(*t*) R. *v.* Saddlers' Co., 10 H. L. Cas. 404. See also *per* Blackburn, J., pp. 420—423.
(*u*) R. *v.* Bangor, L. R. 18 Q. B. D. 365.
(*x*) Id., pp. 367, 368.
(*y*) R. *v.* Mayor of Leeds, 11 A. E. 512.
(*z*) R. *v.* Archdeacon of Middlesex, 3 A. E. 615; *Ex parte* Duffield, 3 A. & E. 617; *Ex parte* Winfield, 3 A. & E. 614.
(*a*) R. *v.* Lyme Regis, 1 Doug. 79.

person next on the poll, if it could be shewn that so many votes had been given for the former, after notice of his disqualification, as to reduce the number of legal votes given to him below that given to the next on the poll (*b*).

Where question cannot be otherwise tried.

Finally, if from the nature of the office or otherwise, the question cannot be tried by *quo warranto* or by any other mode, the Court, if satisfied that an election is void, will grant a mandamus for a new election; provided the circumstances are such, in other respects, as to warrant the granting of the writ (*c*); and sometimes where the invalidity of the first election is not quite clear (*d*); and even after one of the claimants has actually been sworn into the office (*e*).

But if there is any other mode of trying the title to the office, a mandamus will not be granted (*f*).

(*b*) R. *v.* Tewkesbury, 9 B. & S. 683.

(*c*) *Per* Patteson, J., R. *v.* Stoke Damarel, 5 A. & E. 590; R. *v.* Bedford Level, 6 East, 356. In this case Lawrence, J., said he did not think it a universal rule that where a *quo warranto* lies the Court will in no case grant a mandamus. There might be cases where the latter might be deemed the more proper remedy (p. 367).

(*d*) R. *v.* Birmingham, 7 A. & E. 254; *Re* Barlow, 30 L. J. Q. B. 271; R. *v.* Hertford College, L. R. 3 Q. B. D. 704.

(*e*) R. *v.* Bedford Level, *ubi supra*.

(*f*) R. *v.* Thatcher, 1 D. & R. 426. See and distinguish *Ex parte* Mawey, 3 E. & B. 718, *ante*, p. 291.

★ CHAPTER V. [★ 294]

MANDAMUS TO INFERIOR TRIBUNALS.

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General rule.

A MANDAMUS issues, says Blackstone, to "the judges of any inferior Court commanding them to do justice according to the powers of their office, wherever the same is delayed: for it is the peculiar business of the Court of King's Bench to superintend all inferior tribunals, and therein to enforce the due exercise of those judicial or ministerial powers with which the Crown or the Legislature has invested them, and this not only by restraining their excesses, but also by quickening their negligence and obviating their denial of justice" (*a*).

To what Courts not granted.

A mandamus has never been issued to any of the superior Courts (*b*); though, before the Judicature Acts, it would have been granted to a judge of assize, where he refused to perform a duty obligatory upon him and not merely discretionary (*c*). Sect. 16 of the Judicature Act, 1873, now vests in the High Court the jurisdiction exerciseable by the Courts created by Commissioners of Assize, of Oyer and Terminer, and of Gaol Delivery (see also sect. 37).

Neither is there any instance of a mandamus to the Judicial Committee of the Privy Council (*d*).

★ The Court refused to issue a mandamus [★ 295] to the Court of Admiralty (*e*), or to the Central Criminal Court (*f*).

(*a*) 3 Com. 110. Mandamus has for this purpose superseded the old original writ of *procedendo ad judicium* which issued out of Chancery.

(*b*) See R. *v.* Oxenden, 1 Show. 218; Rioter's case, 1 Vern. 175.

(*c*) See R. *v.* Harland, 8 A. & E. 826. But cf. *Ex parte* Fernandez, 10 C. B. N. S. 3; 30 L. J. C. P. 321, and the judgments in R. *v.* Central Criminal Court, L. R. 11 Q. B. D. 483, 484.

(*d*) *Ex parte* Smyth, 3 A. & E. 719.

(*e*) Sayer *v.* Newton, cited Cas. t. Hard. 217.

(*f*) R. *v.* Central Criminal Court, L. R. 11, Q. B. D. 479.

Scope of the mandamus when granted.

Wherever granted it is to compel the exercise of a jurisdiction which the inferior tribunal possesses but refuses to exercise; never to compel the exercise of such jurisdiction in any particular manner; or by way of appeal from its actual exercise.

A mandamus to a judicial officer differs in this respect from one directed to a purely ministerial officer, which may be and usually is to order the doing of some particular act and in a manner prescribed.

A mandamus is never granted to compel the re-hearing of a case already decided (*g*); or by way of appeal (*h*); or to interfere with rules of practice which are not in the opinion of the High Court unreasonable (*i*).

If the tribunal ordained by law have heard and determined however erroneously, the superior Court will not interfere by mandamus (*k*).

Neither will a mandamus be granted to enforce the judgment of an inferior Court where that Court can do so itself (*l*); or where there is any other method of enforcing it (*m*).

With reference to inferior tribunals, it is also to be observed that a mandamus is never granted against any of the subordinate officers to compel a performance of their duties. "Officers are incident to all courts, and must partake of the nature of those several courts in which they attend; and the judges, or those who have the supreme authority in such courts, are the proper persons to censure the behaviour of their own officers; and if they should be mistaken the Queen's Bench cannot relieve" (*n*).

[★ 296] ★But if an inferior Court abstain from entering upon the merits of a case, in consequence of its arriving at a wrong decision upon a preliminary point of law, this will be regarded as a refusal to hear; and a mandamus to hear and determine will be granted (*o*).

(*g*) *Per* Patterson, J., *Ex parte* Smith, 3 A. & E. 722; *Ex parte* Morgan, 2 Chitt. 250; R. *v.* Monmouthshire, 7 D. & R. 334; 4 B. & C. 844.

(*h*) R. *v.* West Riding, 1 A. & E. 563; R. *v.* Manor of Old Hall, 10 A. & E. 248; cf. R. *v.* West Riding, 7 T. R. 467.

(*i*) See *post*, pp. 301, 302.

(*k*) See R. *v.* Lords Commissioners of the Treasury, 10 A. & E. 179; S. *v.* S. 10 A. & E. 374; R. *v.* Manor of Old Hall, 10 A. & E. 248.

(*l*) R. *v.* Conyers, 8 Q. B. 981, 999.

(*m*) Wilkins *v.* Mitchell, 3 Salk. 229. See R. *v.* Conyngham, 1 D. & R. 529.

(*n*) *Per curiam*, Leigh's case, 3 Mod. 335; R. *v.* Conyers, 8 Q. B. 981. See R. *v.* Wood Ditton, 18 L. J. M. C. 218.

(*o*) See *per* Coleridge, J., R. *v.* Richards, 20 L. J. Q. B. 352.

Ecclesiastical Courts.

A mandamus issued in early times to compel Ecclesiastical Courts to assoil an excommunicated person who wished to conform to the orders of the Church (*p*); and to a bishop to absolve an excommunicated person (*q*).

Down to 1857 the Ecclesiastical Courts had jurisdiction in relation to the grant and revocation of probates, wills, and letters of administration; and the reports are full of cases, now obsolete, in which mandamuses were granted in order to compel those tribunals to grant probate or administration to persons entitled. The Court of Probate Act, 1857 (20 & 21 Vict. c. 77), put an end to the jurisdiction of the Ecclesiastical Courts in these matters, and transferred it to a court created by that Act, called the Court of Probate. The jurisdiction of this court was, by Judicature Act, 1873, s. 16, transferred to the High Court of Justice, and is to be exercised by the Probate, Divorce and Admiralty Division of it (s. 31).

A mandamus was granted to compel the judge of the Court of Arches to hear an appeal from a sentence on a clergyman under the Church Discipline Act, 3 & 4 Vict. c. 86 (*r*).

Whether the functions discharged by the Court held by commissioners appointed by the metropolitan for the confirmation of a person elected bishop, in pursuance of letters missive and *congé d' élire*, are judicial or merely ministerial, was made the subject of long and learned discussion in the case (*s*) relating to Dr. Hampden. The commissioners having refused to hear the objections of certain opposers, and having confirmed the election in the form usual where no opposition is made, a mandamus was applied for to compel the archbishop or his vicar-general to hold a court for hearing the objections. Patteson and Coleridge, JJ., were in favour of granting a mandamus, on the ground that the objections should ★have been heard, or at any [★ 297] rate that the case was sufficiently doubtful to require a return. But Lord Denman, C.J., and Erle, J., were so strongly of opinion that 25 Hen. 8, c. 20, made it imperative on the metropolitan to confirm without hearing objections, that the rule for a mandamus was discharged.

(*p*) *Per* Montague, J., case of Parish of St. Balaunce, 1 Palm. 51. In the same case it is said that a mandamus issued to compel a bishop to send to the parson of a parish the chrism, or oil for baptizing.

(*q*) Anon., 2 Roll. 107.

(*r*) R. *v.* Dodson, 7 E. & B. 315.

(*s*) R. *v.* Archbishop of Canterbury, 11 Q. B. 483.

The Court were in this case unanimously of opinion that if there had been a duty to hear the objections, a mandamus would be the appropriate remedy for a refusal.

Where, pending a suit against a bishop before his metropolitan, the bishop appealed to the delegates, a mandamus to compel the latter to admit his allegations was refused (*t*).

Under the Church Discipline Act of 3 & 4 Vict. c. 86, the bishop has a discretion as to issuing a commission to inquire into charges against a clergyman; and where the bishop declined, after inquiry, to issue a commission to inquire into charges against the rector of a parish, preferred by a stranger to it, the Court refused a mandamus to compel him to do so (*u*).

Insolvency and Bankruptcy Commissioners.

A mandamus also lay to the Commissioners of the old Court of Insolvent Debtors (*x*); but not by way of appeal from any judicial determination.

A decision that a deed of assignment, under which a person claimed the surplus of the insolvent's property, was invalid as against the other claimants, was held a judicial determination. And even after the validity of the deed had been upheld by the Lord Chancellor and Lords Justices, the Court of Queen's Bench still held the refusal of the commissioners to make an order vesting the surplus in the assignee under the deed, to be a judicial act with which they would not interfere by mandamus; notwithstanding the opinion of the Chancery Court that, after the validity of the deed had been established, the functions of the commissioners had become ministerial only (*y*).

A mandamus lay also to commissioners under the old Bankruptcy Acts (*z*); but not to exercise in any particular way a discretion vested in them (*a*).

Mayor's Court.

[★ 298] ★ It lay also to the mayor's court to give judgment (*b*).

As to compelling the admission of an attorney to practise there, see *R.* v. *Mayor of London* (*c*).

Before 1856 (*d*) it lay to judges and officers of county

(*t*) Bishop of St. Davids *v.* Lucy, 1 Ld. Ray. 544.
(*u*) R. *v.* Bishop of Chichester, 2 E. & E. 209.
(*x*) *Ex parte* Deacon, 5 B. & Ald. 759.
(*y*) R. *v.* Law, 7 E. & B. 366; *Ex parte* Cook, 2 E. & E. 586.
(*z*) *Re* Bromley, 3 D. & R. 310.
(*a*) *Ex parte* King, 7 East, 91 note.
(*b*) Amherst's case, Sir T. Ray. 214, 1 Vent. 187; R. *v.* Rushworth, W. Kelynge, 287. See Buxton & Singleton, 3 Keb. 432.
(*c*) 13 Q. B. 1.
(*d*) See Eldridge *v.* Fletcher, 3 Dowl. 588; R. *v.* Harden, 2 E. & B. 188; R. *v.* Raines, 1 E. & B. 855; R. *v.* Dowling, 2 E. & B. 196; *Ex parte* Boyle, 2 D. &. R. 13; R. *v.* Richards, 20 L. J. Q.

courts, to compel the performance of any act relating to the duties of their office; but 19 & 20 Vict. c. 108, s. 48, abolished the procedure by mandamus, and substituted a rule or order of the Superior Court, directing the act to be done (*e*). This applies to the City of London Court (*f*). County courts and other local courts.

A mandamus also lay to Sheriff's Courts (*g*); to Courts of Requests, *e. g.*, to compel them to hear and determine a suit instituted (*h*); and, by mandamus in the nature of a *procedendo ad judicium*, to the various local courts, to proceed with causes instituted there (*i*); and also to compel the holding of such courts, even after long disuse (*k*).

As to a forest court, see *R.* v. *Conyers and Others* (*l*).

Mandamuses have been granted to courts leet; to compel the holding of such courts, and the doing and transacting of all their lawful business (*m*), though after long disuse (*n*); to enforce the ★ attend- [★ 299] ance at such a court of the burgesses of a town in order to form a jury (*o*), though a mandamus to the jury by name will not be granted (*p*); to the steward to hold a court leet and swear a jury (*q*), and charge the jury to make proper presentments (*r*); and to restore a steward Courts leet.

B. 351. See and distinguish *Ex parte* Milner, 15 Jur. 1037. See R. *v.* Fletcher, 2 E. & B. 279; R. *v.* Chilton, 15 Q. B. 220.

(*e*) See R. *v.* Bayley, L. R. 8 Q. B. D. 411.

(*f*) Blades *v.* Lawrence, L. R. 9 Q. B. 374.

(*g*) See R. *v.* Sheriffs of York, 3 B. & Ad. 770; R. *v.* Bristol, 1 D. & R. 389, R. *v.* Urling, Fort. 198; Bayly *v.* Boorne, 1 Str. 392; R. *v.* Day, Say. 202.

(*h*) R. *v.* Court of Requests of City of London, 7 East, 292. See also R. *v.* Hopkins, 1 Q. B. 161, and R. *v.* Watson, 2 N. & P. 595.

(*i*) Curser *v.* Smith, 1 Barn. 59 (mandamus to the bailiffs and steward of the Court of Andover); Hurst's case, 1 Sid. 94 (Court of the City of Canterbury); Brooke *v.* Ewers, 1 Str. 113 (local Court of Sandwich); R. *v.* Danser, 6 T. R. 242 (the Court Baron of the manor of Ecclesall in Yorkshire); R. *v.* Mayor and Jurats of Hastings, 1 D. & R. 148; R. *v.* Old Hall, 10 A. & E. 248 (Manor Court).

(*k*) See R. *v.* Steward, &c., of the Manor of Havering-atte-Bower, 5 B. & Ald. 691.

(*l*) 8 Q. B. 981.

(*m*) R. *v.* Milverton, 3 A. & E. 284; R. *v.* Willis, Andr. 279; R. *v.* Grantham, 2 W. Bl. 716.

(*n*) R. *v.* Havering-atte-Bower, 5 B. & A. 691; R. *v.* Mayor of Hastings, 1 D. & R. 148.

(*o*) Rector of Wigan's case, 2 Str. 1207.

(*p*) R. *v.* Bankes, 1 W. Bl. 452.

(*q*) R. *v.* Wills, Andr. 279, 7 Mod. 261.

(*r*) R. *v.* Willis, *ubi supra*. 11 Geo. 1, c. 4, s. 3 (repealed as to all boroughs within the Municipal Corporations Act, 1882, by s. 5 of that Act), gave a remedy by mandamus to compel the holding of courts leet, where mayors, bailiffs, or other chief officers, are to be nominated, elected, or sworn there.

improperly removed (*s*); to compel the borough authorities to allow the use of the guildhall, as had been accustomed for the holding of a court (*t*); and it would lie also to compel the enrolment and swearing in, as resiant and burgess, of a person who had a clear right (*u*).

A mandamus was refused to compel the holding of a court for the purpose of administering the oath of allegience, where there was no necessity for it (*x*).

Customary Courts.

A mandamus has been granted, in the case of customary courts, to compel admission to a copyhold or customary estate, even of a person claiming by descent (*y*); and before the payment of the fine claimed (*z*); but, where there was a claim of a previous fine due in respect of the ancestor from whom the applicant claimed, only on payment of such fine (*a*); and, later, it was held that the heir must pay the fine due in respect of the descent to himself before a surrender would be enforced [★ 300] by mandamus (*b*); also to admit two ★ adverse parties claiming title as devisees to the same copyhold tenement (*c*); and to admit the purchaser under a power of sale given by a testator to his executors (*d*).

Devisees in trust of a copyhold estate were refused a mandamus to compel the admittance of the infant customary heir, as this would be to deprive the lord of the double fine to which he would be entitled if the two devisees had been admitted (*e*).

(*s*) See cases cited *ante*, p. 285, note (*m*).

(*t*) R. *v.* Ilchester, 2 D. & R. 724.

(*u*) R. *v.* West Looe, 3 B. & C. 677.

(*x*) R. *v.* Maidstone, 6 D. & R. 334.

(*y*) Anon., Lofft, 390; R. *v.* Powell, 1 Q. B. 352; R. *v.* Brewers' Co., 3 B. & C. 172; R. *v.* Bonsall, 3 B. & C. 173; R. *v.* Oundle, 1 A. & E. 283; R. *v.* Wilson, 10 B. & C. 80; R. *v.* Hexham, 5 A. & E. 559; R. *v.* Hendon, 2 T. R. 485; R. *v.* Woodham Walter, 10 B. & S. 439. See the previous case of R. *v.* Rennett, 2 T. R. 197. See R. *v.* Dendy, 1 E. & B. 829. "These writs of mandamus do not appear to have been issued prior to the years 1772 or 1773; before that time, even in the case of a private person who wished to be admitted to a customary or copyhold tenement, he was to proceed by bill in Equity to compel an admission" (*per* Lord Denman in R. *v.* Powell, 1 Q. B. 363).

(*z*) R. *v.* Wellesley, 2 E. & B. 924.

(*a*) R. *v.* Coggan, 6 East, 431.

(*b*) R. *v.* Dullingham, 8 A. & E. 858. A different rule was applied in R. *v.* Hendon, 2 T. R. 484.

(*c*) R. *v.* Hexham, 5 A. & E. 559.

(*d*) R. *v.* Wilson, 3 B. & S. 201.

(*e*) R. *v.* Garland, L. R. 5 Q. B. 269. R. *v.* Wilson (10 B. & C. 80) was distinguished on the ground that there was no trust, and as the devisees disclaimed, the heir was entitled to admittance.

A mandamus to hold a court and accept a customary surrender was granted (*f*); but not in a case where the Court of Chancery had already acted and had full power to do what was necessary (*g*): also to compel the entry on the Court Rolls of a deed of disposition under 3 & 4 Wm. 4, c. 74, s. 53 (*h*).

The mandamus to accept a surrender should be to the lord and steward, not to the steward alone; in order that the interests of the lord should be protected (*i*).

With respect to a mandamus to compel the lord and steward to allow inspection of the Court Rolls, see "Inspection of Public Documents," *ante*, pp. 265–268.

A mandamus was refused where it was clear that the claimant's title was barred by lapse of time (*k*); also where the surrenderor had forfeited his tenements to the lord (*l*); also to swear in the steward, he being a private officer to do service for the lord (*m*); also where the surrender had not been prepared by the steward or his deputy, in accordance with a valid custom to that effect (*n*); and there is no instance of a mandamus to the lord to license under any circumstances (*o*).

★ A mandamus will not be granted where [★ 301] the manor belongs to the Crown (*p*).

Quarter sessions.

Mandamuses have been granted to compel quarter sessions to hear and determine a case, within their jurisdiction, which on any grounds they have declined to adjudicate upon at all (*q*); to enter continuances and hear an appeal (*r*), provided a right of appeal ex-

(*f*) R. *v.* Boughey, 1 B. & C. 565; R. *v.* Whitford, 7 D. 709; R. *v.* Brewers' Co., 4 D. & R. 492; R. *v.* Weedon Beck, 13 Q. B. 808; cf. R. *v.* Bishop's Stoke, 8 D. 608; Snook *v.* Mattock, 5 A. & E. 239. See R. *v.* Corbett, 1 E. & B. 836.

(*g*) R. *v.* Pitt, 10 A. & E. 279.

(*h*) Crosby *v.* Fortescue, 5 D. 273. See and distinguish R. *v.* Ingleton, 8 D. 693, as to customary freeholds.

(*i*) R. *v.* Whitford, 7 D. 709; R. *v.* Powell, 1 Q. B. 352.

(*k*) R. *v.* Agardsley, 5 D. 19.

(*l*) R. *v.* Mildmay, 5 B. & Ad 254.

(*m*) Anon., 12 Mod. 666.

(*n*) R. *v.* Rigge, 2 B. & A. 550.

(*o*) R. *v.* Hale, 9 A. & E. 339.

(*p*) R. *v.* Powell, 1 Q. B. 352.

(*q*) R. *v.* Kent, 14 East, 395, with which compare (and distinguish) R. *v.* Cumberland, 1 M. & S. 190; R. *v.* Tucker, 5 D. & R. 441; 3 B. & C. 544; R. *v.* Suffolk, 1 B. & A. 640; R. *v.* Flintshire, 7 T. R. 200; R. *v.* Worcestershire, 3 D. & R. 299.

(*r*) R. *v.* Cambridge, 2 A. & E. 370; R. *v.* Carmarthen, 7 A. & E. 756; R. *v.* Westmoreland, Sayer, 282; R. *v.* Salop, 4 B. & Ald. 626; S. *v.* S., 2 B. & Ad. 145; R. *v.* Cheshire, 5 B. & Ad. 439; R. *v.* Middlesex, 11 A. & E. 809; R. *v.* Dorsetshire, 15 East,

ists (*s*), and in the party applying (*t*), and the right of having the appeal heard has not been lost (*u*), and the applicant was prepared to prosecute it in proper time (*x*); notwithstanding non-compliance on his part with some rule of practice (as to notice or otherwise) laid down by the sessions (*y*); unless the rule be such as commends itself to the High Court (*z*).

But the mere fact that the High Court does not con- [★ 302] sider the rule ★ of practice of quarter sessions to be the most convenient one will not, of itself, be a sufficient reason for granting a mandamus (*a*); and in one case (*b*) it was said (by Wightman, J.), that the Court would not interfere with such rules of practice, unless they were so unreasonable as to be illegal (*c*). A rule which conflicts with an Act of Parliament would, of course, be held unreasonable (*d*). And hearing one side only, and altogether declining to hear the other side, would amount to the same thing as declining to hear the case at all (*e*).

200; R. *v.* Sussex, id. 206; R. *v.* London, id. 632; R. *v.* Suffolk, 1 B. & A. 640 (in which case the mandamus was to hear the appeal on certain only of the specified grounds of appeal); R. *v.* Denbighshire, L. R. 15 Q. B. D. 451; R. *v.* Surrey, L. R. 6 Q. B. D. 100; R. *v.* Kent, 7 B. & S. 394; R. *v.* West Riding, id. 14; R. *v.* Middlesex, 9 L. J. M. C. 59; R. *v.* Huntingdonshire, L. R. 1 Q. B. 36; R. *v.* West Riding, 10 B. & S. 840. See and distinguish R. *v.* Derbyshire, 4 T. R. 488, where by an inclosing Act the justices were bound to receive the appeal but not to respite it.

(*s*) See R. *v.* Kent, 9 B. & C. 283; R. *v.* West Riding, 1 Q. B. 624; R. *v.* Surrey, 2 T. R. 504; R. *v.* Recorder of Ipswich, 8 Dowl. 103; R. *v.* Oxfordshire, 1 B. & C. 279; R. *v.* Lincolnshire, 3 B. & C. 548; R. *v.* Gloucestershire, 2 D. & R. 426; R. *v.* Oxfordshire, 5 D. 116; R. *v.* Shropshire, L. R. 6 Q. B. D. 669; R. *v.* Wiltshire, 4 Q. B. D. 326; R. *v.* Cockburn, 4 E. & B. 265; R. *v.* Shrewsbury, 1 E. & B. 711.

(*t*) R. *v.* Middlesex, 16 East, 310; R. *v.* Bond, 6 A. & E, 905; R. *v.* Recorder of Bath, 9 A. & E. 871.

(*u*) Anon., 1 Sess. Cas. 271.

(*x*) R. *v.* West Riding, 4 M. & S. 327.

(*y*) R. *v.* Lancashire, 7 B. & C. 691; R. *v.* Wiltshire, 10 East, 404; R. *v.* Surrey, 1 M. & S. 479; R. *v.* Essex, 1 B. & Ald. 210; R. *v.* Norfolk, 5 B. & Ad. 990; R. *v.* Staffordshire, 4 A. & E. 842 (with which cf. R. *v.* Cheshire, 9 L. J. M. C. 88); R. *v.* Wilts, 8 B. & C. 380; R. *v.* Lincolnshire, 5 D. & R. 347; see R. *v.* Pawlett, L. R. 8 Q. B. 491.

(*z*) R. *v.* Essex, 2 Chitt. 385; R. *v.* West Riding, 5 B. & Ad. 667; R. *v.* Monmouthshire, 1 B. & Ad. 895.

(*a*) R. *v.* Suffolk, 6 M. & S. 57; R. *v.* Montgomeryshire, 3 D. & L. 119; R. *v.* Warwickshire, 6 Q. B. 750.

(*b*) R. *v.* Montgomeryshire, 3 D. & L. 129.

(*c*) See R. *v.* Norfolk, 5 B. & Ad. 990; R. *v.* Carnarvon, 4 B. & Ald. 86.

(*d*) R. *v.* Kent, 6 M. & S. 258.

(*e*) *Per* Holroyd, J., R. *v.* Carnarvon, 4 B. & Ald. 88.

Preliminary objection.—Where, on a preliminary objection, the sessions wrongly decide, on a point of law, against hearing the appeal at all, a mandamus to enter continuances and hear will be granted (*f*); but not where, on the hearing, they reject certain evidence, on a preliminary objection taken to its admissibility (*g*). "We are not aware of any instance in which the Court has interfered by mandamus where the sessions have heard the appeal, because they have not received *all* the evidence which the party thinks ought to have been received" (*h*).

When decision on a preliminary point is conclusive.—If, however, on such an objection to the admissibility of a particular piece of evidence, they decline to hear the case further, their decision is conclusive only where the point involves matter of fact merely, not if it involves a point of law (*i*).

★ The question whether an examination or [★ 303] statement of grounds of appeal gives sufficient information to the opposite party, is of the former kind (*k*). And so is the question whether the appellant "immediately" upon giving notice of appeal, had entered into the recognizances required by 35 & 36 Vict. c. 94, s. 52 (*l*).

(*f*) R. *v.* Gloucester, 1 B. & Ad. 1 (in which case the preliminary objection was taken after one witness had been called). *Per* Coleridge, J., R. *v.* Somersetshire, 16 L. J. M. C. 87; R. *v.* Lindsey, 6 M. & S. 379; R. *v.* Hertford, 4 B. & Ad. 561; cf. R. *v.* Monmouth, L. R. 5 Q. B. 251; R. *v.* Leicestershire, 15 Q. B. 88; R. *v.* Liverpool, 15 Q. B. 1070; R. *v.* Kent, L. R. 6 Q. B. 132, disapproving R. *v.* Cambridgeshire, 1 L. M. & P. 47; 19 L. J. M. C. 130; R. *v.* West Riding, L. R. 11 Q. B. D. 417; R. *v.* Staffordshire, L. R. 7 Q. B. 288. Cf. R. *v.* Middlesex, L. R. 2 Q. B. D. 516; R. *v.* Frieston, 5 B. & Ad. 599 (*per* Patteson, J.)

(*g*) R. *v.* Frieston, *ubi supra*; *Ex parte* Gill, 53 L. T. N. S. 728. See and distinguish R. *v.* West Riding, 5 B. & Ad. 1003.

(*h*) *Per cur.* R. *v.* Cambridgeshire, 1 D. & R. 325.

(*i*) R. *v.* Kesteven, 3 Q. B. 810; cf. R. *v.* Somersetshire, 16 L. J. M. C. 86. See *per* Coleridge, J., R. *v.* Richards, 20 L. J Q. B. 352, and R. *v.* Lancashire, L. R. 6 Q. B. 97.

(*k*) R. *v.* Kesteven, *ubi supra*. The cases of R. *v.* Carnarvon, 2 Q. B. 325 (a decision of Williams, Coleridge, and Wightman, JJ.), and R. *v.* West Riding, 2 Q. B. 331 (a decision of Lord Denman, C.J., Patteson, Williams, and Coleridge, JJ.), were considered and deliberately departed from as wrong by the Court, (Lord Denman, C.J., Patteson, Williams, and Wightman, JJ.), in this case. See also R. *v.* Pontefract, 2 Q. B. 548; R. *v.* Bridgwater, 10 A. & E. 693; *Ex parte* Ackworth, 3 Q. B. 397.

(*l*) R. *v.* Berkshire, L. R. 4 Q. B. D. 469. In this case quarter sessions held that a recognizance entered into four days after notice of appeal was not a compliance with the Act; and the Court, considering the question substantially one of fact, refused a mandamus.

A question as to the sufficiency of the notice of appeal is of the latter kind (*m*); and if quarter sessions refuses to hear an appeal on the ground of the insufficiency of the notice, the Court, if satisfied of its sufficiency, will grant a mandamus (*n*). So also where they erroneously hold the notice not to have been given in time (*o*).

Where quarter sessions declined to hear an appeal from a refusal of a license, on the erroneous ground that the applicant was not a new tenant of the house, in respect of which a license had previously been refused, a mandamus to hear and determine the application was granted (*p*).

A mandamus will not be granted to compel them to receive any particular evidence which, in hearing a case, they have rejected as inadmissible (*q*).

Where on an appeal against an order of justices to pay a highway board a sum of money for expenses in- [★ 304] curred in repairing certain ★ highways, quarter sessions, wrongly holding that the highway board had been dissolved for all purposes, refused the board a *locus standi;* and then, treating the appeal as unopposed, quashed the order, a mandamus was granted to compel the sessions to enter continuances and hear the appeal (*r*).

Where a case is dismissed by sessions on a question of fact, *e.g.*, whether a particular township did or did not maintain its own poor, the Court will treat the decision as final and refuse a mandamus (*s*).

Where, on appeal to quarter sessions against a conviction under the Vagrant Act, 5 Geo. 4, c. 83, s. 4, for "unlawfully using certain subtle craft, means, and device" without adding the words of the statute "by palmistry or otherwise," the sessions quashed the conviction on the ground that the omission of these words

(*m*) R. *v.* Newcastle-on-Tyne, 1 B. & Ad. 933; R. *v.* Devon, 1 M. & S. 411; R. *v.* West Riding, 4 B. & Ad. 688; R. *v.* Surrey, 3 D. & L. 573; R. *v.* Denbighshire, 9 D. 509; R. *v.* West Riding, 3 D. & L. 152; R. *v.* Middlesex, *id.* 745; R. *v.* Cornwall, 5 A. & E. 134; R. *v.* Oxfordshire, 4 Q. B. 177; R. *v* Bedfordshire, 11 A. & E. 134; R. *v.* Cheshire, *id.* 139; R. *v.* Oxfordshire, 4 Q. B. 177; R. *v.* Kent, L. R. 8 Q. B. 305; R. *v.* Buckinghamshire, 4 E. & B. 259, note.

(*n*) Ib.

(*o*) Drake's case, L. R. 5 Q. B. 33.

(*p*) R. *v.* Middlesex, L. R. 6 Q. B. 781.

(*q*) R. *v.* Cambridgeshire, 1 D. & R. 325.

(*r*) R. *v.* Essex, L. R. 11 Q. B. D. 704.

(*s*) R. *v.* Flintshire, 15 L. J. M. C. 55. See also R. *v.* Somersetshire, *id.* 86.

made the conviction bad; this was held not to be a decision merely on a preliminary point, but a hearing and adjudication upon the merits; and a mandamus was refused (*t*).

Lush, J., pointed out that a decision on the merits may be either upon the legal merits or the merits of the matters of fact (*u*).

Instances of mandamuses granted.—A mandamus lies to compel quarter sessions to pay over to the highway authority of a particular area one-half the expense of maintaining a road within such area, under section 13 of 41 & 42 Vict. c. 77 (*x*).

A mandamus was granted to restore to his office a clerk of the peace, appointed *quamdiu se bene gesserit*, who had been wrongfully removed (*y*).

A mandamus was also granted to compel quarter sessions to erase an entry manifestly false, and made without jurisdiction (*z*); but a mandamus would not, according to Patteson, J., be granted ★ to erase [★305] a wrongful entry when made within their jurisdiction (*a*); nor, according to the same judge, one of which is perfectly harmless and cannot be used prejudicially to either party, when explained by proper evidence (*b*); nor would a mandamus be granted to compel them to correct a clerical error in a recognizance (*c*).

A mandamus has been granted to compel them to issue the necessary process for the enforcement of the judgment of a previous quarter sessions, where there has been no unreasonable delay in making the application (*d*); also to grant costs, where it is imperative upon them to do so (*e*); and to issue a distress warrant for levying the costs awarded by them (*f*); to al-

(*t*) R. *v.* Middlesex, L. R. 2 Q. B. D. 516.

(*u*) Id., p. 521. Cf. on this point R. *v.* Dayman, 7 E. & B. 672.

(*x*) R. *v.* West Riding, L. R. 8 App. Cas. 781.

(*y*) R. *v.* Evans, 12 Mod. 13.

(*z*) R. *v.* West Riding, 3 G. & D. 170; 5 Q. B. 1. Quarter Sessions have no authority of themselves to make the erasure; but they derive the power from the Court when called on by mandamus to exercise it (*per* Patteson, J., 3 G. & D. 175).

(*a*) R. *v.* Ackworth, 3 Q. B. 397. See also R. *v.* Hewes, 3 A. & E. 725, where the Court refused a mandamus to alter the minutes of a verdict, on a representation that the verdict was erroneously entered at the trial.

(*b*) R. *v.* Cornwall, 5 Q. B. 9, note.

(*c*) R. *v.* Stack, 12 L. J. M. C. 58.

(*d*) R. *v.* Warwickshire, 2 A. & E. 768.

(*e*) R. *v.* Monmouthshire, 1 D. & L. 145; R. *v.* West Riding, 2 B. & S. 811; cf. Sheffield Gas Co. *v.* Overseers of Sheffield, 12 Jur. N. S. 162.

(*f*) R. *v.* Hants, 1 B. & Ad. 654.

low fees to which a coroner is entitled (*g*); also to make up a record of the proceedings against a person convicted by them, for the purpose of enabling him to plead *autrefois* convict (*h*); and, under special circumstances, to state a case which they have granted (*i*); but not where, from the circumstances of the case, the proceeding could lead to no result, as where the only case which the sessions would agree to sign would have excluded the point of law relied on by the party demanding it (*k*).

A mandamus was granted to compel quarter sessions to make an order for one of the petty constables of constabulary to raise and levy by rate a sum of money, to reimburse him money paid for his district towards the county rate, under 12 Geo. 2, c. 29 (*l*); also to compel a recorder to examine the accounts of an inspector of weights and measures (under 5 & 6 Wm. 4, c. 63, s. 17), and to make an order for reasonable remuneration to him (*m*).

[★ 306] ★ A mandamus was granted to quarter sessions to make compensation to a sheriff for the abolition of his fees under 55 Geo. 3, c. 50 (*n*); and to make them compel the treasurer of the county to reimburse a constable certain extraordinary expenses (*o*).

So where they refused to hear an appeal from a conviction of a tenant of a public house, coupled with a forfeiture of his license, (under 35 & 36 Vict. c. 94 s. 9), for making an internal communication between his licensed and unlicensed premises, on the erroneous ground that the appeal clauses of 9 Geo. 4, c. 61, were not incorporated in the Act of 1874, a mandamus to enter continuances and hear the appeal was granted (*p*).

Erroneous determination.—If quarter sessions hear the case and determine it, however erroneously, a mandamus will not be granted (*q*).

(*g*) R. *v.* Warwick, 5 B. & C. 430.

(*h*) R. *v.* Middlesex, 5 B. & Ad. 1113. "The prisoner has a right to have the record of the proceedings which passed at sessions correctly made up and to make any use of it that he can." *Per* Lord Denman, id. 1116.

(*i*) R. *v.* Pembrokeshire, 2 B. & Ad. 391.

(*k*) Id.

(*l*) R. *v.* West Riding, 12 East, 116.

(*m*) R. *v.* Recorder of Hull, 8 A. & E. 638.

(*n*) R. *v.* Middlesex, 3 B. & Ad. 100.

(*o*) Hunt's case, 1 Str. 93. See R. *v.* Erle, 2 Burr. 1197.

(*p*) R. *v.* West Riding, L. R. 11 Q. B. D. 417.

(*q*) R. *v.* Middlesex, 4 B. & Ald. 298; R. *v.* Hewes, 3 A. & E. 725; R. *v.* Leicestershire, 1 M. & S. 442; R. *v.* Richardson, 1 Wils. 21; R. *v.* Carnarvon, 4 B. & Ald. 86; R. *v.* Cambridgshire,

This is so even though the decision be arrived at by wrongfully counting the vote of one of the justices who made the order appealed against (*r*); or, though the chairman should give a decision which is not that of the majority of the justices, where that decision is recorded without objection from the dissentient justices (*s*). Especially is this so where their decision is by statute rendered final and conclusive (*t*).

And the exercise of a discretion properly belonging to quarter ★ sessions will never be interfer- [★ 307] ed with (*u*). This includes their determination as to granting or refusing a postponement of the hearing, or as to respiting an appeal, on the ground of the absence of material witnesses, or for any other reason (*x*). But if quarter sessions decline to exercise such a discretion, under the mistaken notion that they have no power to do so, a mandamus would be granted (*y*).

The same rule has been applied to their determination that certain inquests, charged for by the county coroner, should not have been holden. The Court will not review such a decision by mandamus (*z*).

A mandamus will not be granted to compel quarter sessions to enter an appeal anew for the purpose of quashing an order, right in itself, on a purely technical objection founded on the reason given for making it (*a*).

Where the facts of several appeals were the same, and

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1 D. & R. 325; R. *v.* Berkshire, L. R. 4 Q. B. D. 469; Anon., 1 Chitt. 164; Sheffield Gas Co. *v.* Overseers of Sheffield, 12 Jur. N. S. 162; *Re* Pratt, 7 A. & E. 28; R. *v.* Pontefract, 2 Q. B. 548; *Ex parte* Ackworth, 3 Q. B. 397; R. *v.* West Riding, 7 T. R. 467. "There is not an instance that can be cited, where the Court have granted a mandamus to justices to compel them to come to any particular decision." *Per* Abbott, C.J., 4 B. & Ald. 300. "It is unnecessary," said the same judge in another case. "to say whether the judgment pronounced by the Court of Quarter Sessions was erroneous or not; because we are of opinion that even if it were so, we have no jurisdiction to compel them to correct it." See also R. *v.* Monmouthshire, 4 B. & C. 849.

(*r*) R. *v.* Leicestershire, 1 M. & S. 442; cf. R. *v.* Monmouthshire, 4 B. & C. 844, and R. *v.* Monmouthshire, 8 B. & C. 137.

(*s*) R. *v.* Middlesex, L. R. 2 Q. B. D. 516.

(*t*) R. *v.* West Riding, 5 B. & Ad. 1003.

(*u*) See *per* Bayley, J., R. *v.* Norfolk, 1 D. & R. 74; *Re* Newport Bridge, 2 E. & E. 377; *Ex parte* Pontefract, 3 G. & D. 188; R. *v.* Monmouthshire, 1 B. & Ad. 897; R. *v.* West Riding, 2 B. & C. 286. Cf. R. *v.* Russell, 1 Dowl. N. S. 544; R. *v.* Derbyshire, 4 T. R. 488. See *Re* Armstrong, 14 Ir. C. L. R. N. S. 97.

(*x*) *Ex parte* Becke, 3 B. & Ad. 704; R. *v.* Wilts, 13 East, 352; R. *v.* Skircoat, 2 E. & E. 185; R. *v.* Sussex, 4 B. & S. 966.

(*y*) R. *v.* Wilts, 10 East, 404.

(*z*) R. *v.* Gloucestershire, 7 E. & B. 805.

(*a*) R. *v.* West Riding, 2 Q. B. 705; 1 G. & D. 630.

the counsel on both sides agreed that the decision of the sessions on one case should be binding on the parties in the other cases; and the sessions decided for the respondent in the first case, a mandamus to enter continuances and hear the other appeals was refused (*b*).

On the other hand, where two orders had been made for the removal of a father and son from one parish to another, and it was agreed between the parishes that only one appeal should be prosecuted, the determination as to the father to govern the case of the son; the sessions having quashed the order as to the father, and the defeated parish having refused to take back the son in pursuance of the agreement, a mandamus was granted to the sessions to receive and determine the appeal [★ 308] against the order removing the ★ son at a subsequent sessions, the appeal to be entered *nunc pro tunc* with proper continuances (*c*).

Grant of a Case.—A mandamus will not be granted wherever the sessions have granted a case, as the party aggrieved has thereby another sufficient remedy for any miscarriage at sessions (*d*); even though the case granted be not brought up (*e*). But the mere offer, not accepted, to grant a case will not prevent a mandamus being issued to enter continuances and hear an appeal which had been dismissed on a preliminary point (*f*).

The Court will refuse a mandamus to grant a case, that being a matter purely for the discretion of quarter sessions (*g*); but, under special circumstances, a mandamus may issue to compel them to state a case which they have granted (*h*).

Where quarter sessions decided, subject to a case for the opinion of the Superior Court, the terms of which the justices could not agree upon for several sessions, a mandamus to enter continuances and hear the appeal was granted; the conditional order of sessions being no decision (*i*). But a mandamus was refused where the

(*b*) R. *v.* Worcestershire, 9 D. & R. 210.

(*c*) R. *v.* Wiltshire, 1 East, 683.

(*d*) R. *v.* West Riding, 1 A. & E. 606; R. *v.* Cartworth, 1 D. & L. 837. See and distinguish R. *v.* Suffolk. 1 D. 163, where the justices did not grant a case.

(*e*) R. *v.* Suffolk, 6 A. & E. 109; R. *v.* Northampton, id. 111, note.

(*f*) R. *v.* West Riding, 11 L. J. M. C. 84.

(*g*) *Per* Parke, J. (after consultation with the other judges), in R. *v.* Suffolk, 1 Dowl, 163; R. *v.* Jarvin, 9 Dowl. 120; cf. Peat's case, 6 Mod. 229.

(*h*) See *per* Lord Tenterden in R. *v.* Effingham, cited 9 Dowl. 121; R. *v.* Pembrokeshire, 2 B. & Ad. 391; *Ex parte* Jarvin, 9 Dowl. 120.

(*i*) R. *v.* Suffolk, 1 Dowl. 163.

appellant had been guilty of laches in not suing out the certiorari (*k*).

Rehearing Appeal, &c.—A mandamus will not be granted to compel quarter sessions to rehear an appeal, though admissible evidence was rejected (*l*); nor to review certain evidence submitted to them on a matter of appeal on the ground that the conclusion drawn by them was not warranted by the facts proved (*m*); nor to alter the minutes of a verdict according to the facts (*n*); ★ nor to alter a judg- [★309] ment as entered by mistake (*o*); nor to alter their judgment as recorded, by making a special entry of the reasons of the judgment (*p*). Even where it appeared by affidavit that the sessions quashed an order of removal merely on the ground of informality, but refused a special entry of the grounds of their decision for the purpose of preventing a second removal, the Court would not grant a mandamus to compel them to enter their reasons on the order to quash (*q*).

The Court has never interfered by mandamus to dismiss an appeal (*r*).

Mandamus to apprehend.—The Court refused a mandamus to a chairman of quarter sessions to compel him to issue process for the apprehension of certain persons

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(*k*) R. *v.* Staffordshire, 1 Dowl. 484.

(*l*) R. *v.* Carnarvon, 4 B. & Ald. 86 ; *Ex parte* Pratt, 2 N. & P. 102.

(*m*) R. *v.* Worcestershire, 1 Chitt. 649. See R. *v.* Berkshire, L. R. 4 Q. B. D. 469.

(*n*) R. *v.* Hewes, 3 A. & E. 725. See also R. *v.* West Riding, 3 N. & M. 802.

(*o*) R. *v.* Leicestershire, 1 M. & S. 442. "If any error was made in the entry of the clerk of the peace, that error should have been pointed out at the sessions, while the Court was sitting and competent to reform its own errors and to draw out a more correct judgment. If this application were entertained, the consequence would be that this Court would have on all occasions to look, not to the record alone, but to extraneous matter, in order to see how the judgment of the justices at sessions was obtained." *Per* Lord Ellenborough, id. 444.

(*p*) R. *v.* Devon, 1 Chitt. 34. "The wonder is that a rule *nisi* was granted in that case" (*per* Lord Denman, R. *v.* West Riding, 5 Q. B. 5.)

(*q*) R. *v.* Lancashire, 3 Q. B. 367. Patteson, J., regretted that the Court could not order the entry to be made, but considered that it had no power to do so according to R. *v.* Wheelock (5 B. & C. 511), where the Court had also refused ; Bayley, J., remarking that the respondents were not concluded by the judgment of the sessions, but might, on the trial of another appeal against another order of removal of the same pauper, explain by evidence to the sessions the particular ground on which the former order of removal was quashed.

(*r*) R. *v.* Wilts, 2 Chitt. 257.

against whom a bill of indictment had been found at those sessions a year previously (*s*): "I am not aware," said Williams, J., "of any instance of a mandamus directed to a justice for such a purpose" (*t*).

To quash a rate.—A mandamus to quash a rate was refused, as that would be to dictate what judgment the inferior Court should give (*u*).

Unwarranted order as to costs.—Where an order is made by consent of the parties to refer the matter to an arbitrator, the order not providing in any way for the costs of the reference and award, a subsequent court of quarter [★ 310] sessions has no power to make any ★ order as to these costs; and a mandamus to compel it to order payment of the successful party's costs was refused (*x*).

To put bond in suit.—A mandamus to compel them to put in suit the bond of a chief constable of a riding was refused, partly on the ground that it contained a condition not warranted by statute, and partly because the applicants were not the riding but a number of individuals who alleged that they had been cheated of their money (*z*).

A mandamus to compel the putting in suit of a bond given by the high constable, who, in disobedience to an order of quarter sessions, had levied excessive rates on a parish, was also refused; as the procedure might occasion the magistrates costs for which they had no means of reimbursing themselves (*a*).

Petty sessions and justices.

There are instances of mandamuses to quarter sessions under the old Insolvent Debtors Acts (*b*); but these are now of no value as precedents.

The principles applicable to petty sessions and justices are similar to those applied in the case of quarter sessions.

A mandamus would be granted wherever justices improperly refuse or neglect to hear and determine a case within their jurisdiction (*c*). They must give a judgment of some sort (*d*).

(*s*) R. *v.* Russel, 1 Dowl. N. S. 544.
(*t*) Ib.
(*u*) R. *v.* Middlesex, 9 A. & E. 540, 546.
(*x*) R. *v.* West Riding, 6 B. &. S. 531.
(*z*) *Re* Lodge, 2 A. & E. 123.
(*a*) *Ex parte* Carlton High Dale, 4 N. & M. 312.
(*b*) R. *v.* Bailiffs of Ipswich, 7 East, 84; *Ex parte* King, id. 91; R. *v.* Surrey, 6 T. R. 76.
(*c*) Caly *v.* Hardy, Holt, 407; R. *v.* Barnstaple, 1 Barn. 137; R. *v.* Drake, 6 M. & S. 116; R. *v.* Kent, 14 East, 395; R. *v.* Cumberland, 1 M. & S. 190; R. *v.* Long, 1 Q. B. 740; R. *v.* Rawlinson, 6 B. & C. 23; R. *v.* Nottingham, 2 Barn. 56; R. *v.* Eaton, L. R. 8 Q. B. D. 158; R. *v.* Paget, L. R. 8 Q. B. D. 151; R. *v.* New Windsor, L. R. 1 Q. B. D. 152, 2 Q. B. D. 544 (*nom.* R. *v.* Monck); R. *v.* Eyre, L. R. 4 Q. B. 487.
(*d*) R. *v.* Tod, 1 Str. 530.

Thus, where a person proceeded against before them, for refusing to maintain his wife and child, denied his marriage, which the overseers offered to prove had been a valid Gretna Green one ; and the justices dismissed the summons, on the ground that the question of the marriage was too important to be decided in this summary manner, the Court held that, having decided to hear the case, the justices were bound to hear the whole of the evidence offered; and a mandamus to compel them to determine the case was granted (*e*). ★ But [★ 311] in a later case this decision was considered by Lord Campbell inconsistent with principle ; as, in his opinion, the determination of the justices was on the very essence of the question before them (*f*).

A mandamus was also granted where a justice refused to proceed upon an information under the Pawnbrokers Act of 39 & 40 Geo. 3, c. 99, on the erroneous ground that it was not a case for a summary conviction in a penalty within the statute (*g*).

So where justices dismissed a summons taken out by the collector of the borough rate against a ratepayer in arrear, on the erroneous supposition that one of the sitting magistrates was, being a town councillor, disqualified from adjudicating upon the summons (*h*), also where they dismissed a summons against one of the owners or managers of a colliery, for an offence under 18 & 19 Vict. c. 108, s. 11, of which he was clearly guilty, on the erroneous ground that the other owners should have been charged with him (*i*); also where they refused to hear and determine an application for a bastardy order, on the erroneous supposition that they had no jurisdiction (*k*), or that the proceeding was not in time (*l*), or that a similar application had already been made and refused (*m*), or that the in-

(*e*) R. *v.* Cumberland, 4 A. & E. 695.
(*f*) R. *v.* Leicester, 15 Q. B. 674, 675.
(*g*) R. *v.* Beard, 12 East, 673.
(*h*) R. *v.* Handsley, L. R. 8 Q. B. D. 383. See the observations (p. 386) on the conflicting case of R. *v.* Gibbon, L. R. 6 Q. B. D. 168; cf. R. *v.* Huntingdon, L. R. 4 Q. B. D. 522. The proper course for justices who think, but are not sure, that they are, on the ground of interest, incompetent to act, is to refuse to do so, leaving the question to be determined on an application for a rule or mandamus; they ought not to state a case under 21 & 22 Vict. c. 43; R. *v.* Rawson, 6 B. & S. 803.
(*i*) R. *v.* Brown, 7 E. & B. 757.
(*k*) *Ex parte* Wallingford, 9 Dowl. 987; R. *v.* Martyr, 13 East, 55. See also R. *v.* Walker, 3 D. & L. 131; R. *v.* Cambridgeshire, 7 A. & E. 480.
(*l*) R. *v.* Tyrwhitt, 15 Q. B. 249.
(*m*) R. *v.* Machen, 14 Q. B. 74.

formation should have been laid before two justices (*n*); also to compel them to issue distress warrants for poor-rates (*o*), or for any other object, where the duty to issue is imperative (*p*); but not otherwise, and not [★ 312] where the legal liability ★was doubtful (*q*); also to compel them to commit for non-payment, by the putative father, of a sum ordered to be paid by him in respect of a child chargeable to the parish (*r*); and to award costs to a party entitled to them by statute (*s*); but not to compel them to make an order of maintenance on any particular parish, as that would be dictating to them the particular decision to which they should come (*t*).

A mandamus or rule would be granted to compel them, in the case of any indictable offence, to receive an information and take the recognizances of the prosecutor and transmit them to the Court in which the indictment is to be tried; but not where the charge brought before them is not cognizable by the criminal law (*u*).

To issue distress warrants.—Mandamuses have frequently been granted to compel justices to issue distress warrants for rates under various Acts (*x*); where having first been summoned had an opportunity of be- the legality of the rate was clear (*y*), and the party ing heard (*z*), and where the duty was imperative (*a*):

(*n*) R. *v.* Russell, 13 Q. B. 237.

(*o*) R. *v.* Ellis, 2 Dowl. N. S. 361. As to the issue of a distress warrant to levy the costs of the prosecution of a highway indictment, see R. *v.* Martin, 2 Q. B. 1037, n.

(*p*) R. *v.* Paynter, 7 Q. B. 255; R. *v.* Trecothick, 2 A. & E. 405; R. *v.* Barker, 6 A. & E. 388; R. *v.* Hants, 1 B. & Ad. 654; R. *v.* Martin, 13 L. J. M. C. 45; R. *v.* Clarke, id. 91.

(*q*) R. *v.* Hughes, 3 A. & E. 425; R. *v.* Morgan, 9 A. & E. 618, n.; R. *v.* Greame, 2 A. & E. 615; R. *v.* Mirehouse, 2 A. & E. 632.

(*r*) R. *v.* Codd, 9 A. & E. 682.

(*s*) R. *v.* Hastings, 6 Q. B. 141; R. *v.* Recorder of Exeter, 5 Q. B. 342.

(*t*) R. *v.* Middlesex, 4 B. & Ald. 298.

(*u*) *Ex parte* Wason, 10 B. & S. 582.

(*x*) R. *v.* Trecothick, 2 A. & E. 405; R. *v.* Morgan, id. 618, n.; R. *v.* Barker, 6 A. & E. 388; R. *v.* Ellis, 2 D. N. S. 361. See R. *v.* Middlesex, 5 N. & M. 126; S. *v.* S.,2 D. N. S. 385; R. *v.* Buckinghamshire, 1 N. & P. 503; R. *v.* Paynter, 7 Q. B. 255; S. *v.* S., 13 Q. B. 399; R. *v.* Sussex, 3 N. & M. 266; R. *v.* Boteler, 4 B. & S. 959; Churchwardens of Bishopsgate *v.* Beecher, 8 Mod. 10; R. *v.* Price, L. R. 5 Q. B. D. 300; R. *v.* McCann, L. R. 3 Q. B. 141, 677.

(*y*) R. *v.* Dyer, 2 A. & E. 606; R. *v.* Dayrell, 1 B. & C. 485; R. *v.* Mirehouse, 2 A. & E. 632. See R. *v.* Jones, 2 Barn. 239; R. *v.* Lee, L. R. 4 Q. B. D. 75; R. *v.* Somersetshire, 1 H. & W. 82.

(*z*) R. *v.* Barclay, L. R. 8 Q. B. D. 306, 486; R. *v.* Benn, 6 T. R. 198.

(*a*) R. *v.* Hughes, 3 A. & E. 429, 432. Contrast case of St. Luke's, 1 Wils. 133.

also to examine overseers' and churchwardens' accounts, pursuant to 50 Geo. 3, c. 59, s. 1 (since repealed) (*b*); also, if necessary, to issue a distress warrant against overseers to compel them to pay over a balance of money in their hands (*c*); and for the payment of expenses incurred by overseers for the maintenance of a pauper under a ★ suspended order of removal (*d*); [★ 313] but to ground an application for a mandamus, there must have been a refusal to pay, and such refusal must have been made known to the justices (*e*).

Justices, in issuing their warrant to enforce a poor-rate, are performing a ministerial act; and, on an application to them for that purpose, an objection cannot be set up which might be taken on appeal against the rate (*f*). But it is different if there was no jurisdiction to make the rate; such a point may be taken before them, and on their refusal to issue a warrant, the procedure by mandamus and return is a convenient way of raising the question and obtaining the opinion of the Court (*g*).

Where justices have thus to act ministerially they cannot impose any conditions which will impair the efficacy of the warrant, as, *e.g.*, directing their clerk to keep it unexecuted for three months (*h*).

Lord Denman said he did not know of a case in which a mandamus had been granted to compel magistrates to issue a warrant of commitment for the purpose of enforcing a conviction; the case of a mandamus to issue a distress warrant being different, as there it is necessary that the rate should be collected without delay (*i*). Where the conviction was for unlawfully killing a salmon, the Court in its discretion refused a mandamus to compel the issue of a warrant of commitment, saying that the case was one in which the parties might well wait till another offence was committed (*k*).

A mandamus lay to compel the performance by justices of their duties under the statutes for the summary recovery of premises by landlords (*l*); to take security

(*b*) R. *v.* Cambridge, 8 D. 89.

(*c*) R. *v.* Carter, 4 T. R. 246; R. *v.* Essex, 3 B. & Ad. 941; R. *v.* Pascoe, 2 M. & S. 343; R. *v.* Dartmouth, 5 Q. B. 878.

(*d*) R. *v.* North Riding, 6 L. T. N. S. 351.

(*e*) *Ex parte* Whitemarsh, 8 D. 431.

(*f*) *Per* Blackburn, J., R. *v.* M'Cann, 9 B. & S. 43. (*g*) Ib.

(*h*) R. *v.* Handsley, L. R. 7 Q. B. D. 398; R. *v.* Middlesex, 12 L. J. M. C. 36.

(*i*) R. *v.* Williams, 9 Q. B. 976; s. c. *nom. Ex parte* Thomas, 16 L. J. M. C. 58. See R. *v.* Robinson, 2 Smith, 274; R. *v.* Broderip, 7 D. & R. 861; R. *v.* Twyford, 5 A. & E. 430. (*k*) Ib.

(*l*) R. *v.* Richardson, 1 Wils. 21; *Ex parte* Fulder, 8 D. 535. See and distinguish R. *v.* Traill, 12 A. & E. 761.

on articles of the peace exhibited (*m*); to put in execution the statute of forcible detainer (*n*); and to [★ 314] ★ inquire of a forcible entry (*o*); though in a more recent case (*p*) a mandamus was refused on the ground that there was no instance in which such an interference of magistrates had taken place; also to hear and determine a dispute between a Friendly Society and one of its members (*q*); to pay the amount, apportioned by the Commissioners of the Treasury, of the annuity awarded to a retired governor of a prison (*r*); to examine and allow the accounts of overseers under 50 Geo. 3, c. 69, s. 1 (*s*); to appoint a surveyor of highways as required by statute (*t*), and overseers (*u*); to make a rate to reimburse a surveyor of highways for moneys expended by him as such (*x*); also to set out on the record of a conviction the evidence on which the conviction was founded, as nearly as possible in the words of the witnesses (*y*); to amend their return to a *certiorari* by adding the information on which the conviction was founded; and to compel a justice to produce certain depositions taken before him, for the purpose of enabling the party charged to found an indictment for perjury against the deponents (*z*); but the Court refused a mandamus to compel a magistrate to deliver copies of the depositions to a person committed, not finally for trial, but only for re-examination (*a*).

A mandamus to restore their clerk was refused; as he holds office at their pleasure (*b*).

Before the statute 6 & 7 Vict. c. 67, s. 3 (giving pro-

(*m*) R. *v.* Lewis, 2 Str. 835. On affidavit that the applicant was so infirm that his life would be endangered by coming to town to give security, the mandamus directed the justices of the county where he resided to take his surety; R. *v.* Lewis, 1 Barn. 166.

(*n*) R. *v.* Montague, 1 Barn. 72; R. *v.* Long, 1 Barn. 82.

(*o*) Anon., 6 Mod. 139, 164.

(*p*) *Ex parte* Davy, 2 Dowl. N. S. 24. *Per* Wightman, J.

(*q*) See R. *v.* Shortridge, 1 D. & L. 855; R. *v.* Godolphin, 8 A. & E. 338 (in both of which cases the mandamus was refused, as the particular societies were held not to come within the Acts).

(*r*) R. *v.* Middlesex, L. R. 11 Q. B. D. 656, L. R. 9 App. Cas. 757.

(*s*) R. *v.* Cambridge, 8 D. 89.

(*t*) R. *v.* Denbighshire, 4 East, 142.

(*u*) R. *v.* Horton, 1 T. R. 374; R. *v.* Palmer, 8 East, 416; R. *v.* Worcestershire, 12 A. & E. 28; R. *v.* Salop, 3 B. & Ad. 910; R. *v.* Rufford, 1 Str. 512; R. *v.* Lancashire, 1 D. & R. 485; R. *v.* Sparrow, 7 Mod. 393.

(*x*) Hassel's case, 1 Str. 211.

(*y*) *Re* Rix, 4 D. & R. 352; R. *v.* Warnford, 5 D. & R. 489. See also R. *v.* Kiddy, 4 D. & R. 734.

(*z*) Anon., 1 Chitt. 627.

(*a*) R. *v.* Lord Mayor of London, 5 Q. B. 555.

(*b*) *Ex parte* Sandys, 4 B. & Ad. 863.

tection to every person acting in obedience to a peremptory writ of mandamus), the Court was extremely cautious in granting a mandamus, wherever there was any doubt whether the justices had the jurisdic- ★ tion which the writ would have commanded [★ 315] them to exercise (*c*); at any rate unless a satisfactory indemnity were given to the justices by the applicant (*d*). But the doubt as to the jurisdiction of the justices must have been a reasonable one (*e*); and, since that Act, the Court thought that it ought not (by granting a mandamus in a case alleged to be doubtful) to hold out to justices that they should make a return to a writ of mandamus, instead of obeying it, for the sake of obtaining the protection of a peremptory mandamus under the statute (*f*).

A mandamus was granted to compel justices to allow a rate properly made and signed by the overseers (there being no churchwardens), under 43 Eliz. c. 2 (*g*); and to allow and sign any other poor-rate properly made (*h*); such an act being merely ministerial and formal (*i*). So for any other duty obligatory upon them which they refuse to perform (*k*), and as to which a discretion is not given them (*l*).

(*c*) R. *v.* Buckinghamshire, 2 D. & R. 689, 1 B. & C. 485; R. *v.* Mirehouse, 2 A. & E. 632; R. *v.* Broderip, 5 B. & C. 239; R. *v.* Godolphin, 8 A. & E. 338; R. *v.* Dyer, 2 A. & E. 606, 613; R. *v.* Newcomb, 4 T. R. 368; R. *v.* Twyford, 5 A. & E. 430; R. *v.* Sillifant. 5 N. & M. 640.

(*d*) See for example, R. *v.* Mirehouse, *ubi supra*.

(*e*) See *per* Littledale and Williams, JJ., R. *v.* Marriott, 12 A. & E. 784; R. *v.* Ellis, 2 Dowl. N. S. 361; R. *v.* Middlesex, id. 385, and for a case since the statute, R. *v.* Dartmouth, 5 Q. B. 878.

(*f*) R. *v.* Dartmouth, 5 Q. B. 886. *Sed vide per* Blackburn, J., in R. *v.* McCann, 9 B. & S. 43.

(*g*) R. *v.* Godolphin, 1 D. & L. 830.

(*h*) R. *v.* Beecher, 8 Mod. 335; R. *v.* Yarborough, 12 A. & E. 416.

(*k*) See R. *v.* D'Oyley and Hedger, 12 A. & E. 151; R. *v.* Middlesex, 1 Wils. 125 (both cases as to appointment of overseers); R. *v.* Dartmouth, 5 Q. B. 878; R. *v.* Kynaston, 1 East, 117; Anon., 2 Chitt. 257, and R. *v.* Benn, 6 T. R. 198 (to summon for non-payment of poor-rates); R. *v.* Bateman, 4 B. & Ad. 552 (to summon a special petty session pursuant to 7 & 8 Geo. 4, c. 31, s. 8, for compensation for injury by rioters); R. *v.* King's Lynn, 3 B. & C. 147 (as to the costs of defending actions on 57 Geo. 3, c. 19, s. 18); R. *v.* Devon, 1 B. & Ald. 588 (as to making reasonable recompense to an examiner of weights and measures under 37 Geo. 3, c. 143); Mews *v.* R., L. R. 8 App. Cas. 339; see R. *v.* Stone, 7 B. & S. 769 (an application to compel the hearing and determining of a claim for compensation under the Lands Clauses Consolidation Act, 1845).

(*l*) See R. *v.* Mills, 2 B. & Ad. 578.

[★316] ★ A mandamus was granted to compel the visiting justices of a county prison, with whom a borough council had entered into a contract, under sect. 31 of 28 & 29 Vict. c. 126, for the receipt and maintenance of prisoners maintainable at the expense of the borough, to make all orders for the payment of all reasonable charges for the maintenance in the asylum at Broadmoor of a prisoner, maintainable by the borough, who had become insane whilst in the county prison (*m*).

A mandamus will not lie to compel justices to direct an indictment against a parish (under 25 & 26 Vict. c. 61, s. 18), for non-repair of a highway, where the fact of its being a highway is *bonâ fide* disputed (*n*). Their power to direct such an indictment to be preferred exists only where, in the case of an admitted highway, the question is—upon whom the liability to repair it rests (*o*).

A mandamus to compel justices to make a rate to reimburse two of the inhabitants their charges, in defence of an indictment for not repairing a bridge, was refused (*p*).

Where justices have heard and determined, however erroneous their decision, or the grounds for it, may be, the Court will not interfere by mandamus; provided there has been an actual and not merely illusory hearing (*q*).

But where the costs of a compensation inquiry, to be "settled and allowed" by a justice, were by statute to be paid by one party; and the justice disallowed the whole bill of costs prepared by the other party's solicitor, thinking that the Act did not authorize the allowance of the costs, a mandamus was granted to compel allowance of the costs (*r*).

[★317] ★ *Discretion.*—Where justices have a discretion, the Court will not interfere with their mode of

(*m*) R. *v.* Lewes, L. R. 10 Q. B. 166, 579.
(*n*) R. *v.* Farrer, 7 B. & S. 554.
(*o*) Ib.
(*p*) Anon., 1 Str., 63.
(*q*) R. *v.* Rogers, 2 Dowl. N. S. 673; R. *v.* Cumberland, 1 M. & S. 190; R. *v.* Blanshard, 18 L. J. M. C. 110; 13 Q. B. 318. *Per* Lord Ellenborough, 1 M. & S. 195; R. *v.* Richardson, 1 Wils. 21. See also R. *v.* Jukes, 8 T. R. 625. See and distinguish R. *v.* Justices of York, 1 A. & E. 828. See also R. *v.* Mewes, L. R. 6 Q. B. D. 47. There justices having refused to make an order, for the maintenance of a prisoner in a lunatic asylum, on the treasurer of the county whence the prisoner had been removed, holding, erroneously, that the liability of the county treasurer under under the former Acts was extinguished by the Prison Act, 40 & 41 Vict. c. 21, the Court of Appeal, affirming the decision of a Divisional Court, granted a mandamus.
(*r*) R. *v.* Justices of York, 1 A. & E. 828.

exercising it. A mandamus to compel them to hear and determine an information for perjury, alleged to have been committed by a witness in a civil suit still pending, was refused, where in the exercise of their discretion they declined to adjudicate; especially as there was another remedy, by preferring an indictment before a grand jury (*s*). Nor will the exercise of the discretion of visiting justices as to prisoners' food be interfered with (*t*). This rule was in one case applied even where the justices had decided, without going fully into the merits of the case, under the erroneous impression that an appeal lay to quarter sessions, and that important questions of law were likely to arise (*u*).

"To unravel the grounds and motives which may have led to the determination of a question once settled by the jurisdiction to which the law has referred it would," said Lord Denman, "be extremely dangerous; but many authorities prove that it is beyond our own competency, and there is none to the opposite effect" (*x*).

The Court would not command certain justices to do an act which they had power to do, where it was more fitting, for any reason, that other justices should do it (*y*).

And where there was another remedy open to the applicant, the Court has refused to grant a mandamus to justices (*z*).

As to the abandonment of a bastardy order and a rehearing by justices, see *R.* v. *Hinchliff* (*a*).

A mandamus would be refused to compel a magistrate to hear evidence of the truth of a libel published otherwise than in a newspaper, and where the defendant is not charged with publishing it knowing it to be false (*b*). If the libel is published in a newspaper, evidence of its truth may now be given by the defendant before the magistrate (*c*).

★ In one case, which it would be difficult [★ 318]

(*s*) R. *v.* Ingham, 14 Q. B. 396. See also R. *v.* Byrom, 12 Q. B. 321.

(*t*) R. *v.* North Riding, 2 B. & C. 286.

(*u*) R. *v.* The Justices of the West Riding, 1 Q. B. 624; 1 G. & D. 198.

(*x*) 1 Q. B. 631.

(*y*) *Re* Justices of Gateshead, 6 A. & E. 550, note.

(*z*) R. *v.* Halls, 3 A. & E. 494, 497; R. *v.* Dyer, 2 A. & E. 606, 613. See also R. *v.* Godolphin, 8 A. & E. 338; R. *v.* Ingham, 14 Q. B. 396.

(*a*) 10 Q. B. 356.

(*b*) See R. *v.* Carden, L. R. 5 Q. B. D. 1, and distinguish *Ex parte* Ellissen, referred to in Folkard's Starkie, 592.

(*c*) 44 & 45 Vict. c. 60, s. 4.

to reconcile with strict principle, the Court granted a mandamus to justices to compel them to hear and determine an application for a summons against certain persons for unlawfully conspiring to break the peace and do grievous bodily harm; though there was no misapprehension of the law, and the justices heard all the evidence offered before they declined to issue the summons; and though the words of the Act of Parliament (11 & 12 Vict. c. 42, s. 9) were that the justices "may if they shall think fit" issue a summons. The Court proceeded on the ground that the evidence given in support of the application was so strong as to induce a belief that the justices must have acted upon a consideration of something extraneous and extrajudicial, which ought not to have affected their decision, and that this amounted to a declining of jurisdiction (*d*).

Licensing Justices.—Licensing justices have not heard and determined a case until they have specified on which of the four grounds mentioned in 32 & 33 Vict. c. 27, s. 8, they have refused a license. Should they decline to state it, an application to compel them to hear and determine will be granted (*e*).

As the holder of a license is entitled to notice of intended opposition to its renewal, where the justices adjourned the hearing of several cases, giving notice in Court of the adjournment to a day fixed, an applicant, in one of the adjourned cases, to whom knowledge of the adjournment was not brought, obtained a mandamus to compel the justices to hold an adjourned meeting (though the proper time had gone by), and, after notice to him, to hear and determine his application (*f*).

A mandamus was granted to compel justices to hold an adjournment of the general annual licensing meeting, and to hear and determine an application for the renewal of a license or certificate (*g*).

A mandamus was refused to compel licensing justices to grant an alehouse license (*h*), though the ground of [★ 319] their refusal was the ★ mistaken notion that there was no authority, under the circumstances, to grant a license (*i*). A mandamus to rehear an applica-

(*d*) R. *v.* Adamson, L. R. 1 Q. B. D. 201. Blackburn, J., gave his assent to the decision with considerable reluctance.
(*e*) R. *v.* Sykes, L. R. 1 Q. B. D. 52.
(*f*) R. *v.* Farquhar, L. R. 9 Q. B. 258.
(*g*) R. *v.* Pirehill North, L. R. 13 Q. B. D. 696.
(*h*) R. *v.* Farquhar, L. R. 9 Q. B. 258; *Anon.*, 1 Barn. 402; Giles' case, 2 Str. 881.
(*i*) R. *v.* Farringdon Without, 4 D. & R. 735.

tion for a license, at a time beyond that limited by statute, was also refused (*k*).

Where justices refused a license on the ground that they were not satisfied that the value of the house was sufficient to qualify it according to law, and the chairman read out a minute to that effect in the presence of the applicant, the Court refused a mandamus to hear and determine on the ground that the justices had not "specified in writing to the applicant the grounds of their decision," as required by 3 & 4 Vict. c. 61, s. 1: if the applicant had asked for a copy and been refused, the matter might have been different (*l*).

In several cases the Court appears to have considered the functions of licensing justices as ministerial only; and mandamuses have been granted where they have not determined according to law, though they have heard and determined (*m*).

To state a case.—The duty of justices, under 20 & 21 Vict. c. 43, to state a case, on the application of either party to the proceeding before them, arises only where such party is dissatisfied with the determination of the justices "as being erroneous in point of law."

Where a magistrate, holding that a particular lane was not a "street" within the meaning of the Metropolis Local Management Acts, refused to state a case, a mandamus to compel him to do so was refused; as the determination of the magistrate was a finding of fact and not a decision of a point of law (*n*).

A magistrate will be compelled to state a case, though the ground of legal objection to his decision was not taken at the time, but only when application was made to him to state a case (*o*).

★ But a magistrate will not be compelled [★ 320] to state a case merely because he has improperly rejected evidence, unless it is also shewn that his final decision was wrong (*p*).

The application for a mandamus or rule is rightly

(*k*) R. *v.* Surrey, 5 D. & R. 308.

(*l*) R. *v.* Cumberland, L. R. 8 Q. B. D. 372.

(*m*) See R. *v.* De Rutzen, L. R. 1 Q. B. D. 55. R. *v.* Middlesex, L. R. 6 Q. B. 781, where the justices had erroneously decided that the applicant was not a new tenant of a house in respect of which a license had already been refused by them. R. *v.* Lancashire, L. R. 6 Q. B. 97, where the ground for the mandamus was the rejection of evidence to shew that, from the number of licensed houses already in the neigbourhood, it was undesirable to grant an additional license.

(*n*) R. *v.* Sheil, 50 L. T. N. S. 590.

(*o*) *Ex parte* Markham, 34 J. P. 150.

(*p*) R. *v.* Macclesfield, 2 L. T. N. S. 352.

made to a Divisional Court, and not to the Divisional Court of Appeal from inferior courts (*q*).

A mandamus will not be granted where there is a right of appeal to quarter sessions (*r*).

Rule instead of mandamus.

A new, less dilatory and less expensive method of proceeding, to compel the performance of the duties of their office by justices, was provided by 11 & 12 Vict. c. 44, s. 5.

After reciting that "it would conduce to the advancement of justice, and render more effective and certain the performance of the duties of justices, and give them protection in the performance of the same, if some simple means, not attended with much expense, were devised by which the legality of any act to be done by such justices might be considered and adjudged by a Court of competent jurisdiction, and such justice enabled and directed to perform it without risk of any action or other proceeding being brought or had against him," the section enacts "that in all cases where a justice or justices of the peace shall refuse to do any act relating to the duties of his or their office as such justice or justices, it shall be lawful for the party requiring such act to be done to apply to Her Majesty's Court of Queen's Bench, upon an affidavit of the facts, for a rule calling upon such justice or justices, and also the party to be affected by such act, to shew cause why such act should not be done; and if, after due service of such rule, good cause shall not be shewn against it, the said Court may make the same absolute, with or without or upon payment of costs, as to them shall seem meet; and the said justice or justices, upon being served with such rule absolute, shall obey the same, and shall do the act required; and no action or proceeding whatsoever shall be commenced or prosecuted against such justice or justices for having obeyed such rule, and done such act so thereby required as aforesaid."

[★ 321] ★ This was interpreted, in *R.* v. *Percy* (*s*), to apply only to cases where the justices would need protection, if they did the act required.

Accordingly, where justices refused to go into the matter of an information against an unlicensed person for having, contrary to 35 & 36 Vict. c. 94, s. 11, a board over his door stating that he was licensed to sell

(*q*) *Re* Ellershaw, L. R. 1 Q. B. D. 481.
(*r*) R. *v.* Smith, L. R. 8 Q. B. 146.
(*s*) L. R. 9 Q. B. 64. See also R. *v.* Vaughan and Eyre, 9 B. & S. 329, 335.

beer, &c., the Court held that the method of proceeding to compel the justices to hear and determine the complaint must still be by mandamus (*t*). So, also, where a magistrate declined to hear a charge against a governor of a colony under 11 & 12 Vict. c. 42, s. 2 (*u*).

But *R.* v. *Percy*, so far as it decided that the Act applies only where the justices require protection, was dissented and departed from in a subsequent case (*x*) by Lord Coleridge, C.J., Cave and Williams, JJ., who said: "We are clearly of opinion that such a construction narrows the operation of the statute too much. But also we are not prepared to say that, because the statute may apply to other cases than those in which the justices require protection, there may not be many such cases where the Court may properly grant a mandamus." The Court expressed its willingness to take either course in the case before it, which was an application to compel justices to hear and determine an information for unlawfully encroaching upon a highway. The same view of the statute was taken by Grove and Smith, JJ., in a later case (*y*).

(*t*) R. *v.* Percy, *ubi supra.*

(*u*) R. *v.* Vaughan and Eyre, *ubi supra.*

(*x*) R. *v.* Phillimore, L. R. 14 Q. B. D. 474, note; 51 L. T. N. S. 205.

(*y*) R. *v.* Biron, L. R. 14 Q. B. D. 474; 51 L. T. N. S. 429.

[★ 322] ★ CHAPTER VI.

MANDAMUS TO PUBLIC BODIES AND PUBLIC OFFICERS.

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1. To Public Bodies.

General rule. Mandamuses have also been granted to compel the performance, by various public bodies, of duties which there was no other, or no equally efficacious, mode of enforcing. But the rule applies in their case as in that of all inferior courts, that if, being the legally constituted tribunal for the determination of the matter in question, they have actually heard and determined, however erroneously, a mandamus will not be granted; whereas if they refuse or neglect to hear and determine, they will be compelled to do so by mandamus.

Mandamuses have been issued to municipal and other corporations, to railway and other companies, to poor law guardians, to local boards, to district and burial boards, to sewer, drainage, inclosure and tithe commis- [★ 323] sioners, to churchwardens and vestries, ★ to road and river trustees, to railway commissioners, and other public bodies.

Municipal corporations have been compelled by mandamus to assemble and do the business of the corporation (*a*); to elect burgesses and aldermen (*b*); to proceed to the election of bailiffs, coroners, chamberlains, and the other annual officers of the corporation (*c*). Municipal corporations.

If a municipal election is not held on the appointed day or within the appointed time, or on the day next after that day or the expiration of that time, or becomes void, the municipal corporation is not thereby dissolved or disabled from electing; but the High Court may, on motion, grant a mandamus for the election to be held on a day appointed by the Court (45 & 46 Vict. 50, s. 70).

A mandamus has been granted to elect a mayor (*d*); to proceed to another election of a person as mayor, after a void election (*e*); a mere colourable election being considered a void one (*f*); to swear in the Mayor (*g*); to compel a person duly elected to take upon himself the office of mayor (*h*); to elect, to admit, and swear into the office of alderman (*i*), and to enforce performance of the duties of the office (*k*); to restore an alderman improperly removed (*l*); to put the corporate seal to the certificate of the election of recorder according to the vote of the majority (*m*); and to restore a recorder improperly removed (*n*); to admit to the office of ★ councillor (*o*), and to receive and count the [★ 324] vote of one duly elected (*p*); and to compel an elected

(*a*) R. *v.* Kingston-upon-Hull, 11 Mod. 382; s. c. 8 Mod. 209; R. *v.* Liverpool, 1 Barnard, 82.

(*b*) R. *v.* Bridgwater, 2 Chitt. 256; R. *v.* Thetford, 8 East, 270.

(*c*) Scarborough case, 2 Str. 1180. (*d*) See cases *ante*, p.

(*e*) R. *v.* Corporation of Pembroke, 8 Dowl. 302.

(*f*) See *per* Lord Mansfield, R. *v.* Bankes, 3 Burr. 1454; R, *v.* Mayor of Cambridge, 4 Burr. 2008; Case of Bossiny *alias* Tintagel, 2 Str. 1003; Case of Aberystwith, 2 Str. 1157; R. *v.* Newsham, Say. 211; R. *v.* Corporation of Bedford, 1 East, 79; R. *v.* West Looe, 3 Burr. 1386.

(*g*) See cases cited *ante*, p. 276, note (*b*). As to whether a mayor need now be sworn, see Rawlinson on Municipal Corporations, 8th ed., p. 126.

(*h*) R. *v.* Leyland, 3 M. & S. 184. But see now 45 & 46 Vict. c. 50, s. 34.

(*i*) R. *v.* Mayor, &c., of London, 9 B. & C. 1; R. *v.* Mayor, &c., of Cambridge, 14 L. J. Q. B. 82, and cases cited *ante*, p. 276, note (*c*). An alderman, too, was formerly compellable by mandamus to serve the office if elected; but see now 45 & 46 Vict. c. 50, s. 34.

(*k*) See R. *v.* Portsmouth, 3 B. & C. 156, 157.

(*l*) See the cases cited *ante*, p. 284, note (*o*).

(*m*) R. *v.* Mayor of York, 4 T. R. 699.

(*n*) See cases cited *ante*, p. 285, note (*e*).

(*o*) R. *v.* Mayor, &c., of Leeds, 7 A. & E. 963. See R. *v.* Tewkesbury, L. R. 3 Q. B. 629.

(*p*) R. *v.* Mayor of Leeds, 11 A. & E. 512; cf. R. *v.* Bangor, L. R. 18 Q. B. D. 349.

councilman to accept the office (*q*); to elect a burgess (*r*); to compel the assessment of compensation for loss of office, under 5 & 6 Wm. 4, c. 76 (*s*), but not where the amount of compensation would be merely nominal (*t*); to pay the fees of the clerk to the justices, properly payable out of the borough fund (*u*); to pay the costs of the prosecutor in a writ of mandamus, which had directed them to proceed to the election of an alderman in place of one who had been ousted on *quo warranto* (*x*); to elect (under 45 & 46 Vict. c. 50, s. 70) auditors and assessors in a borough, it having been discovered that the original election was invalid (*y*); to hold a Court for the revision of the burgess lists (*z*); to compel the mayor and assessors who, at the revision Court, wrongly refused to inquire into the qualifications of a large number of persons (thinking the notices of objection invalid) to hold a court for the revision of the lists, even after the time limited had expired (*a*); to enter an adjournment (when necessary) to a day subsequent to the charter-day, and then hold a meeting (*b*); to restore one of the capital burgesses improperly [★ 325] amoved (*c*); to admit as a ★ resiant and burgess any person who has an absolute right to be admitted (*d*); and the omission of the overseers to make out

(*q*) R. *v.* Bower, 2 D. & R. 842 ; but see now 45 & 46 Vict. c. 50, s. 36.

(*r*) See cases referred to *ante*, p. 276.

(*s*) R. *v.* Mayor, &c., of Newbury, 10 A. & E. 386 ; 1 Q. B. 751 ; R. *v.* Mayor, &c., of Cambridge, 12 A. & E. 702 ; R. *v.* Mayor, &c., of Stamford, 6 Q. B. 433 ; R. *v.* Mayor, &c., of Sandwich, 10 Q. B. 563. See also R. *v.* Mayor, &c., of Manchester, 5 Q. B. 402 : R. *v.* Mayor, &c., of Poole, 1 Q. B. 616 ; R. *v.* Liverpool, 8 A. & E. 176 ; R. *v.* Brighton, 7 E. & B. 249 ; R. *v.* Lichfield, 16 Q. B. 781. Cf. R. *v.* Manchester, 9 Q. B. 458 (a claim to compensation under 5 & 6 Vict. c. 111.)

(*t*) *Ex parte* Lee, 2 N. & P. 63.

(*u*) R. *v.* Mayor, &c., of Gloucester, 5 Q. B. 862.

(*x*) R. *v.* Mayor, &c., of Cambridge, 14 L. J. N. S. Q. B. 82. A mandamus in such cases should simply enjoin payment, leaving the corporation to apply the necessary means : R. *v.* Ledgard, 1 Q. B. 616.

(*y*) *Re* Corporation of Cardigan, Rawl. on Corporations, 8th ed., p. 158.

(*z*) R. *v.* Mayor of Rochester, 7 E. & B. 910 ; E. B. & E. 1024 ; R. *v.* Dartmouth, 7 E. & B. 917, note.

(*a*) R. *v.* Mayor, &c., of Monmouth. R. *v.* Mayor, &c., of Bolton, L. R. 5 Q. B. 251. Cf. R. *v.* Mayor of Eye, 9 A. & E. 670 ; R. *v.* Mayor of Hythe, 5 A. & E. 832 ; R. *v.* Mayor of Bridgnorth, 10 A. & E. 66.

(*b*) R. *v.* Carmarthen, 1 M. & S. 697.

(*c*) Bagg's case, 11 Rep. 94.

(*d*) R. *v.* West Looe, 3 B. & C. 677 ; R. *v.* Bailiffs of Eye, 4 B. & Ald. 271 ; 1 B. & C. 85 ; R. *v.* Mayor of New Winsdor, 7 Q. B.

any list was held not to deprive the applicant of his right to be put on the burgess roll when made (*e*).

Where the parish burgess lists are revised under the Municipal Corporations Act, 1882, any person whose claim has been rejected or name expunged at the revision of the lists may apply, within two months after the last sitting of the Revision Court, to the Queen's Bench Division for a mandamus to the mayor to insert his name in the burgess roll; and thereupon the Court shall inquire into the title of the applicant to be enrolled. If the Court grant a mandamus, the mayor must insert the name in the burgess roll, and add thereto the words "by order of Her Majesty's High Court of Justice," and subscribe his name to those words (45 & 46 Vict. c. 50, s. 47).

Even before this Act, it was not sufficient for the applicant to shew merely that the ground on which his name had been expunged was bad; he should also shew a valid title (*f*).

Where the mayor and assessors refused to hear an objection to a name, on the erroneous ground that the notice of objection was insufficient, a mandamus was granted to revise the lists so far as this name was concerned (*g*).

A mandamus to compel the mayor to insert on the roll the name of a burgess, in respect of several distinct premises occupied by him, was refused (*h*).

A person entitled to be a freeman might, under the repealed statute 12 Geo. 3, c. 21, apply for a mandamus to compel his admission (*i*). Though there is now no statutory provision to a like effect, there is no doubt that a mandamus would be granted to ★ com- [★ 326] pel performance of the duty made obligatory on the mayor by sect. 204 of 45 & 46 Vict. c. 50.

A mandamus has been granted to elect, admit, and (where necessary) swear into the office of town clerk (*k*), and to restore one improperly removed (*l*).

908; R. *v.* Exeter, L. R. 4 Q. B. 110, 114; R. *v.* Mayor of Dover, 11 Q. B. 260.

(*e*) R. *v.* Mayor of Lichfield, 1 Q. B. 461.

(*f*) R. *v.* Mayor of Harwich, 8 A. & E. 919. Cf. R. *v.* Mayor of Lichfield, 2 Q. B. 693, 701; R. *v.* Mayor of Eye, 9 A. & E. 670.

(*g*) R. *v.* Harwich, 1 E. & B. 617. In the Municipal Corporations Act, 1837 (7 Wm. 4 and 1 Vict. c. 8, s. 24) the words were, "It shall be lawful for any person whose claim shall have been rejected, &c., to apply . . . for a mandamus . . . and thereupon for the Court to inquire, &c."

(*h*) R. *v.* Cambridge, 1 E. & E. 210.

(*i*) See cases cited, *ante*, p. 280, note (*k*).

(*k*) See cases cited, *ante*, pp. 227, 281.

(*l*) See cases cited, *ante*, p. 285.

If any office is full *de facto* (except under a void or purely colourable election), the mode of trying the validity of the election or present title to it is not by mandamus, but by *quo warranto* (*m*). On this subject, vide *ante*, pp. 290–293.

A mandamus would be granted to compel the old mayor and deputy mayor to deliver the mace, books, papers, and records, and the keys of the chest belonging to the borough, to the new mayor, if the latter were duly elected (*n*).

A mandamus was granted to compel the delivery up to a town clerk of the common seal, books, papers, and records of the corporation (*o*); also to compel the steward of a borough to attend at the next corporate assembly with the public books which he had refused to produce (*p*); and to compel a private person to deliver up the public books of the borough (*q*). But a mandamus to compel a serjeant at mace to deliver up the mace to his successor was refused (*r*).

A mandamus to enter in the minutes a resolution passed was refused, where the minutes had not been entered and signed in the manner required by statute (*s*).

It was said by Ashurst, J. (*t*), that when a corporator [★327] neglects the ★ duties of his office, the corporation should first take cognizance of it and deprive him; and if the corporation refuse to interfere, then any person injured might apply for a mandamus to the corporation to enforce a performance of their duty. But a mandamus will not be granted in such a case

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(*m*) R. *v.* Phippen, 7 A. & E. 966; R. *v.* Mayor of Colchester, 2 T. R. 259; R. *v.* Stoke Damarel, 5 A. & E. 584; R. *v.* Mayor of Winchester, 7 A. & E. 215; R. *v.* Swyer, 10 B. & C. 486; Frost *v.* Mayor of Chester, 5 E. & B. 531. *Per* Lord Mansfield, R. *v.* Bankes, 3 Burr. 1454; R. *v.* Mayor of Oxford, 6 A. & E. 349; R. *v.* Beedle, 3 A. & E. 467.

(*n*) R. *v.* Buller, 8 East, 389.

(*o*) Crawford *v.* Powell, 2 Burr. 1013. See also R. *v.* Holford, 2 Barn. 330, 350; R. *v.* Cunningham, Ir. L. R. 16 Q. B., &c., Divs. 206.

(*p*) Case of Borough of Calne, 2 Str. 948.

(*q*) R. *v.* Ingram, 1 W. Bl. 50. As to the books of other corporations, see Anon., 1 Barn. 402, where a mandamus was granted to compel the delivery up, by its old clerk, of the public books belonging to the Blacksmiths' Company, London; and Town Clerk of Nottingham's case, 1 Sid. 31, and R. *v.* Hopkins, 1 Q. B. 161 (as to books belonging to a court of requests).

(*r*) R. *v.* Todd, 2 Jur. 565.

(*s*) R. *v.* Evesham, 8 A. & E. 266. See now 45 & 46 Vict. c. 50 s. 22, sub-s. 5, and Rule 12, Sched. 2.

(*t*) R. *v.* Heaven, 2 T. R. 772.

unless some serious inconvenience to the inhabitants is the result of such neglect of duty (*u*), and the duty be clearly imperative (*x*).

A mandamus was granted to compel the corporation to declare vacant the office of a councillor who had duly delivered to the town clerk a letter of resignation, with the amount of the fine (pursuant to sect. 36 of 45 & 46 Vict. c. 50), but who, after his resignation was thus complete, withdrew it with the assent of the corporation (*y*).

A mandamus was issued to the mayor, &c., and the treasurer of a borough, to repay to the Lords Commissioners of the Treasury the amount of the remuneration and allowances of the barrister who tried a petition against the return of a town councillor, under the Corrupt Practices (Municipal Elections) Act, 1872, and to compel the corporation to order such amount to be levied by a borough rate (*z*); also to compel the corporation of a borough to pay to the governor of the county gaol, under 5 & 6 Vict. c. 98, s. 18, their proportion of the expenses incurred in enlarging the prison pursuant to 28 & 29 Vict. c. 126 (*a*); but not to compel them to exercise in any particular way a discretion vested in them, *e.g.*, to approve or disapprove under 7 Wm. 4 & 1 Vict. c. 78, s. 38, an order of justices fixing at a particular amount the salary of the keeper of the borough gaol (*b*).

Mandamuses have issued to municipal corporations to compel the holding of local courts pursuant to their charters, notwithstanding disuse for very many years (*c*); want of funds being no excuse (*d*).

★ The Court refused the application of a [★328] freeman for a mandamus to compel the late mayor and one of the councillors of a borough to pay over to the borough treasurer all moneys received on account of the

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(*u*) R. *v.* Mayor, &c., of Portsmouth, 4 D. & R. 767; R. *v.* Mayor of Totness, 5 D. & R. 481.

(*x*) R. *v.* West Looe, 5 D. & R. 414.

(*y*) R. *v.* Wigan, L. R. 14 Q. B. D. 908.

(*z*) R. *v.* Maidenhead, L. R. 9 Q. B. D. 494. It was held no objection that the Lords Commissioners had cancelled their first certificate, and subsequently sent another to the borough treasurer.

(*a*) R. *v.* Wigan, L. R. 5 Q. B. 267. See also R. *v.* New Sarum, 2 E. & B. 654, and R. *v.* Birmingham, 10 Q. B. 116.

(*b*) R. *v.* York, 1 E. & B. 588.

(*c*) R. *v.* Mayor, &c., of Wells, 4 Dowl. 562; R. *v.* Mayor, &c., of Hastings, 1 D. & R. 148; R. *v.* Havering-atte-Bower, 5 B. & Ald. 691; R. *v.* Ilchester, 2 D. & R. 724.

(*d*) R. *v.* Mayor, &c., of Wells, *ubi supra.*

rents of the corporation: the application for a mandamus, if necessary, should have been made by the treasurer; and, so far as appeared from the facts of the case, the money would have been paid to the treasurer if he had asked for it (*e*).

An application having been made for a mandamus to compel the mayor of a borough to propose a resolution to the burgesses in guild assembled, for the repeal of certain bye-laws, on an allegation that the right of making laws and orders at these guilds was an ancient privilege which the mayors of late years had refused to recognize, the Court doubted whether the matter was not one for the discretion of the mayor, and, in the absence of any precedent, refused a mandamus (*f*).

A mandamus to allow inspection of the books, charters, and muniments of the corporation was refused to a freeman who desired inspection on behalf of a defendant who was being tried for not, as sheriff, executing a criminal (*g*).

But, in a litigation between the freeman of a borough and the new corporation, as to the right of cutting down trees on certain pastures, a mandamus was granted at the instance of the freemen to permit them to inspect the deeds, &c., relating to the pastures in question (*h*).

Before the Ballot Act, the town clerk was compellable by mandamus to grant inspection of the voting papers at an election of town councillors, to any burgess who brought a list of his own to be compared with them (*k*).

For the general principles regulating the granting of mandamuses to compel the allowance of inspection of public documents, vide *ante*, pp. 265–268.

Corporations sole.

Corporations sole, as well as corporations aggregate, have been compelled by mandamus to perform duties of an imperious nature incumbent upon them; but, if there is no imperious duty but only a discretionary power, the Court will not interfere by mandamus (*l*).

[★ 329] ★ See the cases relating to bishops and archbishops referred to *post*, pp. 353, 354.

Corporations generally.

The Court will, if necessary, compel the person who has the custody of the corporate seal to affix it to any act according to the vote of the majority (*n*).

(*e*) R. *v.* Frost, 8 A. & E. 822.
(*f*) *Ex parte* Garrett, 3 B. & Ad. 252.
(*g*) R. *v.* Antrobus, 2 A. & E. 789.
(*h*) R. *v.* Beverley, 8 D. 140; cf. Warriner *v.* Giles, 2 Str. 954.
(*k*) R. *v.* Arnold, 4 A. & E. 657.
(*l*) R. *v.* Bishop of Oxford, L. R. 5 App. Cas. 214; R. *v.* Bishop of Chichester, 2 E. & E. 209.
(*n*) *Per* Lord Kenyon, C.J., R. *v.* Beeston, 3 T. R. 594, citing

Where a discretion is vested in a corporation as to the surrender of its charter and the disposition of its property, the Court will not interfere by mandamus, in case a dispute should arise amongst the members of the corporation as to the way in which they should exercise this power (*o*).

A member of a mere trading corporation would not be granted a mandamus to compel his partners to divide their property (*p*).

Railway companies.

Mandamuses have been granted to compel railway companies to construct their line wherever (which is rarely the case) the language of their special Act is imperative, and there has been a distinct refusal or neglect to do so, or unreasonable delay (*q*); but not if the words of the Act are merely enabling or permissive, and no obligatory duty can be collected from the general purview of the whole statute (*r*), though the company may have exercised some of their powers and made part of their ★ line (*s*) : also to make a branch [★ 330] authorized by an extension Act (*t*); and, in one case, to compel them to reinstate and lay down again a line which they had constructed and afterwards taken up, though there might also exist a remedy by indictment in such a case (*u*); but this case was, in a later

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and approving R. *v.* Windham, Cowp. 377. See also R. *v.* Mayor of York, 4 T. R. 699.

(*o*) *Ex parte* Lee, E. B. & E. 863.

(*p*) R. *v.* Bank of England, 2 B. & Ald. 620.

(*q*) R. *v.* Eastern Counties Railway, 10 A. & E. 531, 9 L. J. N. S. Q. B. 303; R. *v.* Bristol Railway Co., 4 Q. B. 170, 172; R. *v.* Brecknock Canal Navigation, 3 A. & E 223; R. *v.* Lancashire and Yorkshire Railway Co., 1 E. & B. 228; R. *v.* York and North Midland Railway Co., 1 E. & B. 178. See R. *v.* Ambergate Railway Co., 17 Q. B. 362; 1 E. & Bl. 372. The warrant of the Board of Trade may release a railway company from the liability imposed even by imperative words in their Act. See Abandonment of Railways Act, 1850, 13 & 14 Vict. c. 83, s. 19. But it seems that the provisions of the Acts for abandonment of railways apply only to railways authorized to be constructed by an Act of Parliament passed prior to the Railway Companies Act, 1867. (See *arguendo*, *Re* Birmingham, &c., Railway Co., L. R. 18 Ch. D. 156).

(*r*) York, &c., Railway Co. *v.* Reg., 1 E. & Bl. 858; 16 Q. B. 864; Great Western Railway Co. *v.* Reg., 1 E. & Bl. 874, dissenting from R. *v.* Lancashire and Yorkshire Railway Co., id. 228; see pp. 861–3. But though a railway company is not bound to exercise the powers given it by statute, it may by agreement bind itself to do so (*per* Lord Wensleydale, Scottish North Eastern Railway Co. *v.* Stewart, 3 Macq. 414.)

(*s*) See *per* Jervis, C.J., 1 E. & Bl. 870.

(*t*) R. *v.* Great Western Railway, 1 E. & Bl. 253, 774.

(*u*) R. *v.* Severn and Wye Railway Co., 2 B. & Ald. 646. The writ was directed to be to reinstate and lay down again, but not to maintain.

one(*x*), considered to have carried the doctrine as far as the Court would go: also to make an arch over a public road conformably to the provisions of their Act (*y*): to carry a public highway and carriage road over the railway, or the railway over the road by means of a bridge (*z*): to make watering-places for cattle as required by their Act (*a*): to make and restore, according to the statute, such part of a turnpike road as was carried over their railway (*b*); but not to make a bridge and carry the road over it at the rates of inclination delineated on the plans deposited, unless there is something in their special Act, or in the general Acts with which it is incorporated, which requires that the plans should be followed (*c*): to remove obstructions made by them in a highway (*d*): to compel them to proceed after giving a notice to treat (*e*): to issue their warrant to a sheriff to summon a jury to assess the amount of compensation for lands taken or injuriously affected (*f*): to take up [★ 331] an award and pay the arbitrator's ★ fees (*g*), provided the land alleged to have been injuriously affected was so within the meaning of the statute (*h*); and to furnish a copy of the award to the claimant (*i*): and, at one time, when it was thought that an action would not lie for the purpose, to pay the amount of

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(*x*) See *per* Lord Denman in R. *v.* Gamble, 11 A. & E. 72.

(*y*) R. *v.* Eastern Counties Railway Co., 2 Q. B. 569.

(*z*) R. *v.* Wycombe Railway Co., 8 B. & S. 259; L. R. 2 Q. B. 310. Cf. R. *v.* East and West India Docks, &c., Railway Co., 2 E. & B. 466.

(*a*) R. *v.* York, &c., Railway Co., 14 L. J. N. S. Q. B. 277.

(*b*) R. *v.* Birmingham Railway Co., 2 Q. B 47. Cf. R. *v.* Manshester, &c., Railway Co., 3 Q. B. 528; R. *v.* Bristol Railroad Co., 4 Q. B. 162.

(*c*) R. *v.* Caledonian Railway Co., 16 Q. B. 19, 30; North British Railway Co. *v.* Tod, 12 Cl. & F. 722.

(*d*) R. *v.* Newmarket Railway Co., 15 Q. B. 702.

(*e*) R. *v.* Birmingham, &c., Railway Co., 15 Q. B. 634; R. *v.* South Wales Railway Co., 14 Q. B. 902. See R. *v.* London and South Western Railway Co., 12 Q. B. 775; R. *v.* Eastern Counties Railway Co., 2 Q. B. 347; R. *v.* Northern Union Railway Co., 8 Dowl. 329.

(*f*) *Re* South Yorkshire and Goole Railway Co., 18 L. J. Q. B. 333; R. *v.* Irish South Eastern Railway Co., 1 Ir. L. R. N. S. 119; and see Fotherby *v.* Metropolitan Railway Co., L. R. 2 C. P. 188; R. *v.* North Midland Railway Co., 2 Ry. Cas. 1; R. *v.* East Lancashire Railway Co., 9 Q. B. 980.

(*g*) R. *v.* Great Northern Railway Co., L. R. 2 Q. B. D. 151; R. *v.* South Devon Railway Co., 15 Q. B. 1043. As to a mandamus to the arbitrator, see R. *v.* Rynd, 16 Ir. C. L. R. N. S. 29, and R. *v.* Fishbourne, 17 Ir. C. L. R. N. S. 148.

(*h*) R. *v.* Cambrian Railway Co., 10 B. & S. 315.

(*i*) R. *v.* Cambrian Railway Co., L. R. 6 Q. B. 422.

compensation assessed or awarded (*k*); but it is now settled that there is in such a case a complete remedy by action, and therefore a mandamus will not be granted (*l*).

The application against a railway company should not be made too soon. The applicant ought to wait till the company has done all the damage it is likely to do, and then a jury would assess the compensation for the whole; provided the temporary cessation of the works is not *malâ fide* on the part of the company (*m*).

A mandamus to a company to pay the costs of the compensation inquiry was refused, on the double ground that the sheriff had not taxed them, and that the Act gave a remedy by distress (*n*).

A mandamus, it seems, lies to compel the arbitrator to settle the costs of the arbitration under the Lands Clauses Consolidation Act, 1845, in accordance with the rights of the parties (*o*).

Where the landowner agreed to refer his claim against the company to arbitration, neither the deed of reference nor the award making any mention of the costs of the reference, a mandamus to compel payment of those costs was refused (*p*).

A mandamus was granted to compel a railway company to give inspection of the register of shareholders to a judgment creditor (*q*).

Where an inquisition has been duly taken, a mandamus will ★ not be granted to compel the [★ 332] issue of a new precept on the grounds of misdirection by the presiding judge at the inquisition, of the improper rejection of evidence, of the verdict being against the weight of evidence, or of the damages awarded being grossly insufficient (*r*).

Where any verdict is made final by Act of Parliament, the Court will not order judgment to be entered upon it otherwise than in the terms in which it is given by the jury, even though it appear by affidavit that

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(*k*) See R. *v.* Great Western Railway Co., referred to 6 Q. B, 72; R. *v.* Nottingham Waterworks, 6 A. & E. 355.

(*l*) R. *v.* Hull and Selby Railway Co., 6 Q. B. 70; Corrigal *v.* London and Blackwell Railway Co., 5 M. & G. 219; Williams *v.* Jones, 13 M. & W. 628; East and West India Dock Co. *v.* Gattke, 3 Mac. & G. 173.

(*m*) See *Ex parte* Parkes, 9 D. 614.

(*n*) R. *v.* London and Blackwall Railway Co., 3 D. & L. 399.

(*o*) R. *v.* Biram, 17 Q. B. 969.

(*p*) *Ex parte* Regnal, 16 L. J. Q. B. 304.

(*q*) R. *v.* Derbyshire, &c., Railway Co., 3 E. & Bl. 784.

(*r*) R. *v.* Eastern Counties Railway Co., 2 Dowl. N. S. 945.

they took into consideration matters not properly within their jurisdiction (*s*).

A mandamus to compel a railway company to carry the goods of the applicant was refused, on the ground that there was nothing in their Act compelling them to do so; and if any obligation was imposed by the general law of the land, it could be enforced by action (*t*).

A mandamus was granted to compel a railway company to pay under the provisions of their Act, to the overseers of a parish, the deficiency in the assessment of rates as to certain lands, owing to their having been taken by the company (*u*).

After a rule *nisi* had been obtained for a mandamus to compel a railway company to assess compensation for damages under their Act, an agreement, not under the seal of the company, was made between an agent of the company and the claimant, for payment of a sum in settlement of his claim: on the company failing to carry out the agreement, a new rule was obtained for a mandamus to compel them to pay the money according to the agreement, or to summon a jury to assess compensation, or to revive the former rule; and the Court after argument made the rule absolute (*x*).

As a railway company has, under 8 and 9 Vict. c. 20, s. 41 (except when otherwise provided by its special Act), an option in the case of a turnpike road or highway crossed by the railway, of either carrying the line [★333] over the road or the road over the line a ★ mandamus will not be granted to compel it to do one of the two in particular, unless it is shewn that the other cannot be done (*y*).

Lands compulsorily taken by other public bodies.

The principles already stated in the case of railway companies as to compelling by mandamus the assessment and payment of compensation for lands compulsorily taken by them, apply also in the case of other public bodies which take lands in a similar way (*z*).

Companies generally.

Public companies (as distinguished from mere private partnerships) have been compelled by mandamus

(*s*) R. *v.* West Riding, 3 N. & M. 802.

(*t*) *Ex parte* Robins, 7 D. 566.

(*u*) R. *v.* Metropolitan District Railway Co., L. R. 6 Q. B. 698.

(*x*) R. *v.* Bristol, &c., Railway Co., 3 Ry. Cas. 777. See now *ante*, p. 331 note (*l*).

(*y*) R. *v.* South Eastern Railway Co., 4 H. L. Cas. 471.

(*z*) See R. *v.* Commissioners of Thames and Isis, 8 A. & E. 901; *Re* Palmer, 9 A. & E. 463; R. *v.* London Docks Co., 5 A. & E. 163; R. *v.* Commissioners of Nene Outfall, 9 B. & C. 875; *Re* Hungerford Market Co., 2 B. & Ad. 341; R. *v.* Hungerford Market, 1 A. & E. 668; R. *v.* Wilts Canal Co., 8 Dowl. 623; R. *v.* Hungerford Market Co., 4 B. & Ad. 327.

to perform various duties incumbent on them: *e g.*, to swear in a director of a chartered company (*a*): to admit a person duly elected a director by show of hands (*b*): to give a creditor inspection of the register (*c*); but, wherever the right of inspection exists, a distinct refusal must be shewn before a mandamus will be granted (*d*); and the mandamus cannot be directed to the company's clerk, he being a mere officer (*e*): also to register stock in the name of a married woman, since the Married Women's Property Act, 1870 (*f*): to issue their warrant for a jury to assess the damages sustained by a person whose lands were compulsorily taken under their Act (*g*); to pay the purchase money of the land or the amount of damages assessed (*h*); also, to the proper officer, to settle and allow the ★ costs [★ 334] to which the applicant is entitled (*i*): to pay a sum of money recovered in an action against their treasurer, whose goods (by the company's Act of Parliament) were not liable to be taken in execution (*k*); but in a case similar to the last mentioned, where the judgment was entered up, not against the treasurer but against the company, the Court refused a mandamus, as the plaintiff had the ordinary legal remedy of an execution, though it might turn out fruitless owing to the absence of corporation chattels seizable (*l*).

A mandamus was also granted to register a trans-

(*a*) Anon., 2 Str. 696.

(*b*) R. *v.* Government Stock Investment Co., L. R. 3 Q. B. D. 442.

(*c*) R. *v.* Derbyshire, &c., Railway Co., 3 E. & Bl. 784. Since this case was decided the Companies Act, 1862, has been passed, sect. 32 of which enables a judge at Chambers by order to compel an inspection of the register.

(*d*) R. *v.* Wilts and Berks Navigation, 3 A. & E. 477.

(*e*) *Per* Littledale, J., id. 481. See R. *v.* Mariquita, &c., Co., 1 E. & E. 289.

(*f*) R. *v.* Carnatic Railway Co., L. R. 8 Q. B. 299.

(*g*) R. *v.* Nottingham Old Waterworks, 6 A. & E. 355; R. *v.* Market Street, Manchester, 4 B. & Ad. 333, n.; R. *v.* Deptford Pier Co., 8 A. & E. 910.

(*h*) R. *v.* Commissioners of Thames and Isis, 5 A. & E. 804; R. *v.* Nottingham Old Waterworks, 6 A. & E. 355; R. *v.* Swansea Harbour, 8 A. & E. 439; R. *v.* Great Western Railway Co., 5 Q. B. 597, R. *v.* Deptford Pier Co., 8 A. & E. 910.

(*i*) R. *v.* Justices of York, 1 A. & E. 828. Cf. R. *v.* Gardner, 6 A. & E. 112, where the proper officer disallowed the costs, thinking the applicant not entitled to them.

(*k*) R. *v.* St. Katharine's Dock Co., 4 B. & Ad. 360. See Corpe *v.* Glyn, 3 B. & Ad. 801. Cf. Wormwell *v.* Hailstone, 6 Bing. at p. 676.

(*l*) R. *v.* Victoria Park Co., 1 Q. B. 288.

fer (*m*), and to rectify the register (*n*); but a mandamus would probably not now be granted for either purpose, as registration and rectification may be ordered on motion under sect. 35 of the Companies Act, 1862 (*o*). And before this Act a mandamus was refused where the transferor's motive was considered improper (*p*), or the transfer differed in any material respect from the statutory form (*q*), or where a call had been made and not paid before the deed of transfer (*r*).

As to compelling the directors to make a call on the shareholders in such a case as *R.* v. *Victoria Park Co.* (*s*), the Court in its judgment said: "If it were clearly established that they were evading payment of their debts and the due satisfaction of judgments recovered against them, on the ground that they had no corporate assets actually in possession, we should not, [★ 335] perhaps, go beyond the principle which ★ regulates our extraordinary interposition by mandamus, if we compelled them to exercise that power with which the Legislature has trusted them for this very purpose, and put themselves in funds to answer the demands of their creditors" (*t*).

The Court would not grant even a rule for a mandamus to compel a company to take its seal off the register of shareholders; considering that they had no power to order, in this way, the undoing of an act done (*u*).

(*m*) Ward *v.* South Eastern Railway Co., 29 L. J. Q. B. 177; R. *v.* Shropshire, &c., Co., L. R. 8 Q. B. 420.

(*n*) Ward *v.* South Eastern Railway Co., 2 El. & El. 812.

(*o*) See *Re* Stranton Iron and Steel Co., L. R. 16 Eq. 559; *Re* New Zealand Capaga Co., L. R. 18 Eq. 17, note; Denton Colliery Co., L. R. 18 Eq. 16; *Re* Droitwich Salt Co., 43 L. J. Ch. 581.

(*p*) R. *v.* Liverpool, &c., Railway Co., 21 L. J. Q. B. 284. Cf. R. *v.* Irish Midland, &c., Railway Co., 15 Ir. C. L. R. N. S. 514, 525.

(*q*) R. *v.* London General Cemetery Co., 6 E. & Bl. 415; Copeland *v.* North Eastern Railway Co., 6 E. & Bl. 277.

(*r*) R. *v.* Londonderry, &c., Railway Co., 13 Q. B. 998; Hall *v.* Norfolk Estuary Co., 21 L. J. Q. B. 94; s. c. nom. R. *v.* Wing, 17 Q. B. 645.

(*s*) *Ubi supra*, note (*l*),

(*t*) R. *v.* Victoria Park Co., 1 Q. B. 292. In the case before the Court it was admitted that calls had been made to a sufficient extent, but not paid. "It was suggested," says the judgment, "that the real remedy would be the compelling the corporation to enforce the payment of the calls already made, and that no difficulties either technical or substantial existed to prevent this being done. How this may be we know not; but for the present it is enough to say that that does not appear to have been the application made to the corporation, nor is it a part of or consistent with the present rule."—Id. 293. See note (*b*).

(*u*) *Ex parte* Nash, 15 Q. B. 92.

"We may," said Lord Campbell, "upon an application for a mandamus, entertain the question whether a corporation, not having affixed its seal, be bound to do so; but not the question whether, when they have affixed it, they have been right in doing so" (*v*).

A mandamus to the registrar of joint stock companies to register a supplementary deed for changing the name of a company already completely registered, was refused on the ground that, after complete registration, the company had no power to change its name (*x*).

The Court refused to interfere by mandamus to compel a private trading corporation to permit a transfer of stock in their books (*y*); or to compel the governor and company of the Bank of England to grant inspection, to one of its members, of an account of the income and profits of the last half year (*z*).

A mandamus was granted to compel a dock company to perform a statutory duty of making such alterations and amendments in the sewers of a town as were necessary in consequence of the floating of the harbour (*a*); also to repair and maintain parts of the banks of a new channel made by them (*b*).

A mandamus to compel a canal company to establish a ★uniform rate of tolls along the whole line [★ 336] of their canal was refused, on the ground that the company's Acts did not impose such a duty (*c*).

Various city companies have been compelled by mandamus to admit persons entitled to admission (*d*).

Poor law guardians.

Mandamuses have been granted to compel the election of poor law guardians (*e*).

A clause in an Act of Parliament fixing the time of election was considered directory merely, and a mandamus to elect was granted after the expiration of the time named (*f*).

A mandamus has been granted to poor law guardians to compel them to appoint a chaplain pursuant to orders of poor law commissioners, under 4 & 5 Wm. 4, c. 76 (*g*); to compel them to obey an order made by jus-

(*v*) Id. 94.
(*x*) *Re* Sheffield, &c., Insurance Co., 16 L. J. Q. B. 407.
(*y*) R. *v.* London Assurance Co., 5 B. & Ald. 899.
(*z*) R. *v.* Bank of England, 2 B. & Ald. 620.
(*a*) R. *v.* Bristol Dock Co., 6 B. & C. 181.
(*b*) R. *v.* Bristol Dock Co., 2 Q. B. 64.
(*c*) Clarke *v.* Leicestershire, &c., Union Canal, 6 Q. B. 898.
(*d*) See cases cited *ante*, p. 282, note (*o*).
(*e*) R. *v.* Norwich, 1 B. & Ad. 310; R. *v.* St. Mary, Newington, 6 D. & L. 162.
(*f*) R. *v.* Norwich, 1 B. & Ad. 310.
(*g*) R. *v.* Braintree Union, 1 Q. B. 130.

tices, under 4 & 5 Wm. 4, c. 76, s. 27, for relieving a pauper elsewhere than in the workhouse (*h*); to receive into the workhouse, or otherwise provide for the necessary relief and support of, a casual pauper (*i*); to compel them to pay a debt and interest on money borrowed under 22 Geo. 3, c. 83, s. 20, more than twenty years before the application (*k*); to pay to a town clerk the amount allowed by the town council for preparing the register of voters (*l*); to compel obedience to an order of justices for payment of a sum for the maintenance at Broadmoor of a criminal lunatic adjudged by the justices to be settled in the union of the guardians (*m*); to compel them to allow a rated parishioner to inspect, and take copies of and extracts from, the books of accounts of receipts and expenditure (*n*); to appoint a master of the workhouse, pursuant to orders of the poor law commissioners (*o*); to appoint an auditor (*p*); to account to an auditor appointed by the poor law com- [★ 337] missioners (*q*); ★ but not to make an *equal* rate, nor without a previous appeal to quarter sessions (*r*).

Local board. If a local board refuses to perform its duty of providing a satisfactory and healthy system of drainage, the proper remedy is by the prerogative writ of mandamus (*s*).

Where the duty of a local board to do a thing is only conditional on the neglect of some other person to do so after notice, unless such notice has been given, a mandamus would not be granted to compel performance by the local board (*t*).

A mandamus was granted to the chairman of a local board, as returning officer, to compel him to certify the election of a person whom he erroneously supposed to be disqualified as holding a lease from the board (*u*).

A mandamus was granted to compel a local board to

(*h*) R. *v.* Totnes, 7 Q. B. 690.
(*i*) R. *v.* St. Pancrass, 7 A. & E. 750.
(*k*) R. *v.* Carpenter and Others, 6 A. & E. 794.
(*l*) R. *v.* Hull, 2 E & B. 182; 7 E. & B. 801 note.
(*m*) R. *v.* Stepney, L. R. 9 Q. B. 383.
(*n*) R. *v.* Faringdon, 9 B. & C. 541.
(*o*) R. *v.* Oxford, 17 Q. B. 457 note.
(*p*) R. *v.* St. James', Westminster, 1 E. & E. 861.
(*q*) R. *v.* St. Andrew, Holborn, 6 Q. B. 78; R. *v.* Bristol, 13 Q. B. 405.
(*r*) R. *v.* Canterbury, 4 Burr. 2290.
(*s*) Glossop *v.* Heston and Isleworth Local Board, L. R. 12 C. D. 102; R. *v.* Gee, 1 E. & E. 1068.
(*t*) R. *v.* Godmanchester, L. R. 1 Q. B. 328.
(*u*) R. *v.* Gaskarth, L. R. 5 Q. B. D. 321.

make a rate for payment of a judgment debt (*x*). The local board in this case had consented to judgment being signed, with a stay of execution for several months; and it was held that the six months, within which a rate might be made, did not begin to run till the expiration of the time when execution on the judgment might first have been issued (*y*). If, however, the six months had expired before the action was brought, the judgment would not be enforced by mandamus (*z*).

A mandamus to compel a local board to adopt and carry out the Public Libraries Act was refused, on the ground that at the meeting of ratepayers summoned to consider the question of adopting the provisions of the Acts, the chairman, after a resolution in favour of adopting them had been carried by a show of hands, refused to grant a poll which had been duly demanded, and which the Court of Appeal (affirming the decision of a divisional court) held to be demandable as of right at common law, not only in ★ meetings of [★ 338] vestries and meetings called by vestries, but in all cases of popular elections (*a*).

A mandamus was granted also to compel a local board to compensate the owner of a house for injuring the access to it, by levelling and paving the street on which it abutted, under the provisions of the Public Health Act, 1848, 11 & 12 Vict. c. 63, s. 69 (*b*).

A mandamus to compel the settlement by arbitration, or by justices (under sect. 144 of the same Act) of compensation for damage caused by the exercise of the powers of the Act, was refused where the dispute was not as to the amount of compensation, but as to the liability to make any compensation (*c*).

A mandamus was granted to compel a district board to put into repair that portion of a road which was in its district (*d*); also to pay the amount required by a vestry for defraying expenses incurred in respect of Oxford Street, under the Metropolitan Local Management Act, 18 & 19 Vict. c. 120, the whole of which street had been placed under the management of the vestry by an order of the Metropolitan Board of Works (*e*). District boards.

(*x*) R. *v.* Rotherham Local Board, 8 E. & B. 906. (*y*) Ib.
(*z*). See Burland *v.* Kingston-upon-Hull, 3 B. & S. 271 (see *per* Blackburn and Mellor, JJ., p. 279) ; 32 L. J. Q. B. 17.
(*a*) R. *v.* Wimbledon Local Board, L. R. 8 Q. B. D. 459 ; cf. Campbell *v.* Maund, 5 A. & E. 880.
(*b*) R. *v.* Wallasey Local Board, L. R. 4 Q. B. 351; 10 B. & S. 428.
(*c*) R. *v.* Burslem Local Board, 1 E. & E. 1077, 1088.
(*d*) R. *v.* Hackney District, L. R. 8 Q. B. 528.
(*e*) R. *v.* Strand District, 4 B. & S. 551. For an example of

Burial board.

A mandamus to compel a burial board to maintain a burial ground, not the burial ground of any parish, but the property of private persons, was refused (*f*).

Commissioners of sewers and drainage commissioners.

A mandamus would be granted, if necessary, to compel performance of the duties of commissioners of sewers and drainage commissioners; *e.g.*, to compensate for injuries done by their works (*g*); to make rates un- [★ 339] der their Acts (*h*); to apportion the ★ sums necessary to be raised amongst the several parishes, townships, and places within their district (*i*); to grant inspection of all entries of rates and other matters relating to any particular parish aggrieved by a rate imposed (*k*); to make a rate to reimburse the legal representatives of their deceased clerk the cost and expenses incurred by him in opposing a bill in Parliament, which the commissioners, *bonâ fide* and with discretion and prudence, had instructed him to do (*l*).

A mandamus was granted to the commissioners of sewers for the levels of Essex commanding them to reimburse a frontager the expenses incurred by him, in compliance with orders of the commissioners, in repairing the damage done to a sea wall by an extraordinary storm and high tide, and to make and levy such rates as might be necessary for such reimbursement (*m*).

A mandamus to the Metropolitan Commissioners of Sewers to decree compensation for damages under sects. 69, 70 of the Metropolitan Sewers Act, 1848, was refused in a case where the liability to make any compensation was denied (*n*).

Land tax commissioners.

Mandamuses have also been granted to commissioners of land tax: *e.g.*, to proceed to the election of a clerk (*o*); to admit to the office of clerk (*p*); to meet and cause the proportion of land tax charged on their division to be equally assessed within the said di-

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mandamus to the Metropolitan Board of Works, see R. *v.* Metropolitan Board of Works, 3 B. & S. 710.

(*f*) R. *v.* St. John, Westgate and Elswick, 2 B. & S. 703.

(*g*) R. *v.* Commissioners for Pagham Levels, 8 B. & C. 355, and *per cur.* case of Cardiff Bridge, 1 Salk. 146; cf. R. *v.* Commissioners of Essex, 1 B. & C. 477.

(*h*) R. *v.* Commissioners of Essex, 2 Str. 763; R. *v.* Commissioners of Somerset, 9 East, 111; R. *v.* Hare, 13 East, 189.

(*i*) R. *v.* Whitaker, 9 B. & C. 648.

(*k*) R. *v.* Commissioners of Tower Hamlets, 3 Q. B. 670.

(*l*) R. *v.* Norfolk, 15 Q. B. 549; 28 L. J. Q. B. 121. For an application against paving and lighting commissioners, see R. *v.* Commissioners, &c., of Cheltenham, 4 Jur. 1060.

(*m*) R. *v.* Commissioners for Essex, L. R. 14 Q. B. D. 561.

(*n*) R. *v.* Metropolitan Commissioners of Sewers, 1 E. & B 694.

(*o*) R. *v.* St. Martin's, 1 T. R. 146.

(*p*) R. *v.* Thatcher, 1 D. & R. 426.

vision, according to the best of their judgment and discretion, pursuant to statute (*q*).

Where the commissioners in shewing cause against a rule for a mandamus to make an equal assessment for the year (on a suggestion that they had made their assessment on an old and disproportionate estimate), deposed that they had made the assessment for the year according to the best of their judgment and discretion, the Court discharged the rule (*r*).

Inclosure commissioners.

★ A mandamus was granted to compel in- [★ 340] closure commissioners to inquire if there was a modus (*s*).

Tithe commissioners.

A mandamus was granted to compel the tithe commissioners for England and Wales to hear and determine differences, between certain landowners of a parish and its vicar, as to the claim of exemption of certain lands from tithes (*t*).

Where a tithe commissioner proceeded to inquire into the validity of a modus under 6 & 7 Wm. 4, c. 71, s. 45, but postponed making his award until the determination of certain suits pending for the recovery of tithes, the Court refused a mandamus to compel him to make his award (*u*).

Churchwardens.

Mandamus have been granted commanding those to whom the right belonged to elect churchwardens. A mandamus has been issued, for this purpose, to the inhabitants of a parish (*x*); to the rector and existing churchwardens (*y*); to a perpetual curate and the churchwardens or alleged churchwardens, a perpetual curate being the minister of the parish within the meaning of canon 89, with which the custom of the parish was in conformity (*z*); to the rector (*a*); to justices for an extra parochial place (*b*).

And a mandamus was granted in order to give the parties impugning an election an opportunity of trying

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(*q*) R. *v.* Commissioners for Tower Division, Middlesex, 2 E. & B. 694.

(*r*) R. *v.* Commissioners of Land Tax, 16 Q. B. 381.

(*s*) Anon., 2 Chitt. 251.

(*t*) R. *v.* Tithe Commissioners, 18 Q. B. 156. See also S. *v.* S. 15 Q. B. 620.

(*u*) *Re* Tithe Commissioners, 1 Dowl. N. S. 810; cf. R. *v.* Tithe Commissioners, 14 Q. B. 459.

(*x*) R. *v.* Wix, 2 B. & Ad. 197.

(*y*) R. *v.* Birmingham 7 A. & E. 254. See also R. *v.* St. James', Westminster, 5 A. & E. 391; R. *v.* Lambeth, 8 A. & E. 356; R. *v.* D'Oyly, 12 A. & E. 139.

(*z*) R. *v.* Allen, L. R. 8 Q. B. 69.

(*a*) R. *v.* Green, L. R. 1 App. Cas. 513; R. *v.* Perry, 3 E. &. E. 640.

(*b*) Anon., 1 Barn. 155.

its validity, as *quo warranto* does not lie for the office of churchwarden, and there was no mode of trying the right by action, the office not being one of profit (*c*); although another person was in *de facto* possession of the office (*d*).

Mandamuses have also been granted to compel admission to the office (*e*); and swearing in (*f*).

[★ 341] ★ A mandamus was granted to compel churchwardens to call a meeting of the parishioners for the purpose of considering the propriety of making a rate (*g*), though not to compel the churchwardens to make such a rate (*h*): to make and raise one or more rates to pay principal and interest of money borrowed, on the credit of the parish and church rates under the Church Building Acts, 58 Geo. 3, c. 45, and 59 Geo. 3, c. 134 (*i*); but not where it was attempted to charge the rates retrospectively (*k*): also to call a meeting of the parishioners for the election of a perpetual curate according to a custom (*l*); and for the election of churchwardens (*m*); and for the establishing a select vestry under 59 Geo. 3, c. 12 (*n*); and for the election of a surveyor of highways (*o*); and would be granted in a proper case to compel them to elect a vestry and auditors of accounts under 1 & 2 Wm. 4, c. 20 (*p*); but not to admit a vestry clerk (*q*), or to command restoration to that office (*r*); to compel churchwardens to as-

(*c*) R. *v.* Birmingham, *ubi supra;* cf. R. *v.* Lambeth, *ubi supra.*

(*d*) *Re* Barlow, 30 L. J. Q. B. 271; 5 L. T. N. S. 289.

(*e*) R. *v.* Williams, 8 B. & C. 681.

(*f*) Anon., 2 Chitt. 254; R. *v.* Harris, 3 Burr. 1420, where there were cross mandamuses, and Lord Mansfield held that the officer to whom they were directed was bound to obey both, the office of swearing in being ministerial only. See further on this point, R. *v.* Rees, 12 Med. 116; Catten *v.* Barwick, 1 Str. 145; King's case, 1 Keb. 517, 521; R. *v.* Stevens, 3 B. & S. 333. See also the cases referred to *ante*, p. 128 note (*d*).

(*g*) R. *v.* St. Margaret's, Westminster, 4 M. & S. 250.

(*h*) Id.; R. *v.* St. Peter's, Thetford, 5 T. R. 364; R. *v.* Wilson, 5 D. & R. 602; cf. R. *v.* Thomas, 3 Q. B. 589, and R. *v.* Dalby, id. 602.

(*i*) R. *v.* Brancester, 7 A. & E. 458; R. *v.* St. Michael's, 5 A. & E. 603; cf. R. *v.* Bangor, 10 Q. B. 91. See further on the subject of church rates, R. *v.* Haworth, 12 East, 555; R. *v.* Wrottesley, 1 B. & Ad. 648; R. *v.* Sillifant, 4 A. & E. 354.

(*k*) R. *v.* Dursley. 5 A. & E. 10.

(*l*) Faulkner *v.* Elger, 6 D. & R. 517.

(*m*) R. *v.* Birmingham, 7 A. & E. 254.

(*n*) R. *v.* St. Bartholomew, 2 B. & Ad. 506; R. *v.* St. Martin-in-the-Fields, 3 B. & Ad. 907.

(*o*) R. *v.* Hillingdon, 18 Q. B. 718.

(*p*) R. *v.* St. Pancras, 1 A. & E. 80.

(*q*) R. *v.* Croydon, 5 T. R. 713.

(*r*) Vide *ante*, p. 275.

semble a meeting (under 10 Anne, c. 11, s. 24) for the purpose of agreeing upon and ascertaining the rates to be assessed for the repair of the church (*s*), and for the purpose of making a rate, in pursuance of certain statutes, for the expenses of the parish church (*t*); and to convene one for a similar purpose under a local and personal Act (*u*); to concur with the other parish officers in making a rate (*x*); to pay the arrears of salary to which a clergyman was entitled under a local ★ Act (*y*); to pay (and if necessary make a [★342] rate for the purpose) a sum borrowed more than twenty years previously, and charged on the rates (*z*); to compel churchwardens, overseers and rate collectors to produce the parish rates and books at the scrutiny of a poll, which had been taken for the election of churchwardens overseers and surveyor (*a*); and to compel them to swear in overseers of the poor under a local Act (*b*).

A mandamus was granted to compel payment of a sum advanced more than twenty years previously, notwithstanding sect. 59 of 58 Geo. 3, c. 59, where the sum borrowed was made a charge upon the rates (*c*). But where the Act under which the sum was borrowed empowered churchwardens to make rates for repayment by instalments "within the period of twenty years at farthest," it was held by the House of Lords (confirming the decision of the Exchequer Chamber, which had reversed that of the Queen's Bench), that after the expiration of the twenty years, there was no power to make a rate for the purpose of repayment, and that a mandamus to compel the churchwardens and overseers to make one could not be sustained (*d*).

In parishes created under the Church Building Acts for ecclesiastical purposes only, and not separately maintaining their own poor, it was held unnecessary to give notice of a vestry meeting in the manner required by 58 Geo. 3, c. 69, s. 1; and a mandamus to compel

(*s*) R. *v.* St. Margaret's, Westminster, 4 M. & S. 250.
(*t*) R. *v.* St. Saviour's, Southwark, 7 A. & E. 925.
(*u*) R. *v.* St. Saviour's, 7 A. & E. 925; R. *v.* Hammersmith, 3 B. & S. 504, note.
(*x*) Anon., 2 Chitt. 254.
(*y*) *Ex parte* Scott, 8 D. 328.
(*z*) R. *v.* St. Michael's, Southampton, 6 E. & B. 807. Cf. R. *v.* Willim, 16 Q. B. 1, as to an unauthorized borrowing.
(*a*) R. *v.* Fall, 1 Q. B. 636.
(*b*) R. *v.* Manchester, 7 D. 707.
(*c*) R. *v.* Carpenter, 6 A. & E. 794; R. *v.* St. Michael's, Southampton, 6 E. & B. 807. Cf. R. *v.* Hurstbourne Tarrant, E. B. & E. 246.
(*d*) R. *v.* All Saints, Wigan, L. R. 1 App. Cas. 611.

the vicar and churchwardens of a parish to do so was refused (*e*).

The Court refused a mandamus to compel the vicar and churchwardens to insert, on the notice paper of the next vestry, a notice of motion by a ratepayer for changing the hour for holding vestry meetings; as the right of determining the hour of meeting rests with the vicar or churchwardens (*f*).

A mandamus was refused to compel the churchward- [★ 343] ens to call a ☆ meeting for the election of a sexton, the right of election being disputed, as the right to the office might be tried in an action (*g*); also to allow inspection of their accounts, under 17 Geo. 2, c. 38, s. 1, where the applicant did not shew some public ground for desiring the inspection (*h*).

A mandamus was refused to compel churchwardens to summon the parishioners for the purpose of taking a poll on a motion which had been carried by show of hands, when it appeared that the motion was for an application of funds in breach of trust (*i*), if a mandamus were granted, and the result of the poll should be an affirmance of the illegal resolution, it might then be said that the poll was taken under the authority of a mandamus from the Court (*k*).

Where, at a vestry meeting for the election of waywardens for several townships, the candidates were successively and separately nominated, proposed and seconded, and after a show of hands declared by the chairman to be duly elected waywardens for each township; and then an elector demanded a poll in respect of two of the townships (neither of them the last in order), a mandamus to compel the vicar, churchwardens and inhabitants to reassemble the meeting and proceed to an election of waywardens for the two townships was refused; on the ground that there was not one election for all the townships, but a separate election for each, and that the demand for a poll in respect of any particular township should have been made immediately after the declaration of the show of hands as to it (*l*).

A mandamus was also refused to compel churchwardens to give up the custody of the vestry book to the vestry clerk, Lord Ellenborough observing that, if it

(*e*) R. *v.* Barrow, L. R. 4 Q. B. 577.
(*f*) R. *v.* Tottenham, L. R. 4 Q. B. D. 367.
(*g*) R. *v.* Stoke Damarel, 5 A. & E. 584.
(*h*) R. *v.* Clear, 7 D. & R. 393.
(*i*) R. *v.* St. Saviour's, 1 A. & E. 380.
(*k*) *Per* Lord Denman, ib.
(*l*) R. *v.* Thomas, L. R. 11 Q. B. D. 282.

belonged to him as annexed to his office, he might bring an action of detinue or trover (*m*).

A mandamus to compel the old churchwardens to deliver the parish books to the new was refused, on the ground that a contest between parish officers as to the right to keep those books ought to be tried upon a feigned issue (*n*).

★ As to repairing a disused burial-ground, [★ 344] see *R.* v. *Bishop Wearmouth* (*o*).

Vestry. A mandamus was granted to compel a vestry to take up an award, made under a local improvement Act (which incorporated the Lands Clauses Consolidation Act, 1845), assessing compensation for injuriously affecting the access to a house by raising the level of a street (*p*); against the select vestrymen of a parish under a local and personal Act, to compel them to levy church rates (*q*); also to compel a metropolitan vestry to well and sufficiently light a part of Vauxhall Bridge, under 18 & 19 Vict. c. 120 (*r*).

A mandamus was refused to compel the inspectors of votes at an election of vestrymen to return a person not duly qualified, though he had the majority of votes (*s*).

A vestry, under the Metropolis Local Management Act (18 & 19 Vict. c. 120), has a discretion, in making the necessary sewers, as to the order in wich the works are to be executed; and they may judge of the exigency and pressing necessity for the works in one district as compared with another. In order to compel the vestry by mandamus to execute the works in any particular district, it must therefore be shewn that a reasonable time for doing so has elapsed, or that there is a present duty to drain that particular district at once (*t*).

As to manner in which the sense of a vestry may be taken, and the right to demand a scrutiny, see *R.* v. *Vicar and Churchwardens of Hammersmith* (*u*).

Church trustees. A mandamus was granted to compel church trustees, appointed under a local Act, to produce their accounts

(*m*) Anon., 2 Chitt. 255.

(*n*) R. *v.* Street, 8 Mod. 99. As to a similar application against overseers, see R. *v.* Simms, 4 D. 294.

(*o*) L. R. 5 Q. B. D. 67.

(*p*) R. *v.* St. Luke's, Chelsea, L. R. 7 Q. B. 148.

(*q*) R. *v.* St. Margaret's, Leicester, 8 A. & E. 889. Cf. R. *v.* St. Saviour's, 7 A. & E. 925.

(*r*) R. *v.* Lambeth, 3 B. & S. 1.

(*s*) R. *v.* St. Pancras, 7 E. & B. 954.

(*t*) R. *v.* St. Luke's, Chelsea, 31 L. J. Q. B. 50; 5 L. T. N. S. 744; 10 W. R. 293.

(*u*) 3 B. & S. 504, n.

before the parochial auditors appointed under the Vestry Act, 1 & 2 Wm. 4, c. 60 (*x*).

Road trustees.

Mandamuses have been granted to compel trustees of turnpike roads to fence certain roads as required by [★ 345] statute (*y*); but not to ★ repair a road (*z*); also to compel them to call a meeting for establishing a uniform rate of tolls under 59 Geo 3 (*a*); and to pull down a toll-house and remove the materials, as having become useless and no longer required for the purposes of the road, within 4 Geo. 4, c. 95, s. 57 (*b*).

Where the applicant for a mandamus to compel the trustees of a turnpike road to make a new piece of road, or diversion, had allowed twelve years to elapse (and seven after the expiration of the trustees' compulsory powers) before making his application, a mandamus was refused (*c*).

A mandamus would be granted to compel road trustees to give inspection of their books of accounts to persons entitled to see them (*d*).

As the claim of a mortgagee of turnpike tolls, under 3 Geo. 3, c. 126, s. 81, is equitable only, a mandamus will not be granted against the road trustees to pay the interest on the mortgage (*e*).

River trustees.

A mandamus was granted to compel the trustees of the River Weaver Navigation to assess compensation (under 33 Geo. 2, c. 49, s. 13, and 10 Geo. 4, c. 70) to a landowner for injury to his salt works caused by a certain lock, weir, and sluices, under the control of the trustees, not being raised to a sufficient height (*f*).

A mandamus was granted to compel the Ouze Bank Commissioners, acting under a local and personal Act, to proceed to put the banks in a permanent state of stability and security, in accordance with the requirements of the Act (*g*).

East India Company.

A mandamus lay to the old East India Company; *e.g.*, to send out to the Governor-General in Council a

(*x*) R. *v.* St. Pancras, 6 A. & E. 314. See also 3 A. & E. 535.
(*y*) R. *v.* Trustees of Roads from Luton, &c., 1 Q. B. 860. Cf. R. *v.* Commissioners of Llandilo District, 2 T. R. 232.
(*z*) R. *v.* Trustees of Oxford, &c., Roads, 12 A. & E. 427. Cf. Anon., Comb. 257.
(*a*) R. *v.* Bury and Stratton Roads, 6 D. & R. 368.
(*b*) R. *v.* Greenlaw Road Trustees, L. R. 4 Q. B. D. 447.
(*c*) R. *v.* Rochdale and Halifax, 12 Q. B. 448.
(*d*) R. *v.* Northbeach Roads, 5 B. & Ad. 978.
(*e*) R. *v.* Bally Turnpike Road, 22 L. J. Q. B. 164.
(*f*) R. *v.* Delamere, L. R. 2 E. & I. App. 419.
(*g*) R. *v.* Ouze Bank Commissioners, 3 A. & E. 544.

despatch as altered by the Board of Control (*h*), a legal obligation imposed upon the directors by 33 Geo. 3, c. 52, s. 12 (*i*). But a mandamus would ★ not [★ 346] lie to compel them to discharge arrears of pay to one of their officers; as there was no legal right to such pay (*k*).

Servants of the Crown.

As a mandamus will not lie to the Crown, it would seem to follow as a necessary consequence that the servants of the Crown, as such, are also exempt from the writ. This principal has not, however, been consistently adhered to, though it has been reaffirmed in the most recent cases on the subject.

Lords of the Treasury.—In *R.* v. *The Lords Commissioners of the Treasury* (*l*) a mandamus was granted to compel the Lords of the Treasury to pay a retiring allowance to a public officer under 3 Geo. 4, c. 113, where they had submitted a vote for the purpose to Parliament, which passed it; but the pension was not specifically mentioned in the Appropriation Act, which, however, directed a gross sum to be applied in discharge of retiring allowances. The application for a mandamus was considered as in no way against the Crown or against officers with whom, for this purpose, the Crown had anything to do; but against public officers, having money in their hands to be paid to an individual (*per* Lord Denman, C.J., and Patteson, J.), of which money the Crown was not in possession; it having been appropriated by an Act of Parliament, and being at the time in the power of a public board (*per* Coleridge, J.).

In a case of *Re Hand* (*m*), which followed soon after, Lord Denman observed that all the Court said in the former case was that the Lords of the Treasury must make a return and shew why the money was not paid over, and that no decision had been given on the point of law.

And in a subsequent case (*n*) Coleridge, J.—after declaring the rule established, that against the servants of the Crown as such and merely to enforce the satisfaction of claims upon the Crown a mandamus will not lie—endeavours to reconcile *R.* v. *The Lords Commissioners of the Treasury* case with the above-stated principle in the same way.

(*h*) R. *v.* East India Co., 4 B. & Ad. 530. See also S. *v.* S., 4 M. & S. 279.
(*i*) See *per* Lord Campbell, *Ex parte* Napier, 18 Q. B. 701.
(*k*) *Ex parte* Napier, 18 Q. B. 692.
(*l*) 4 A. & E. 286.
(*m*) 4 A. & E. 996.
(*n*) *Re* De Bode, 6 D. 792.

But in a later case (*o*) Lord Denman said: "I can scarcely have meant [*In re Hand*] that no decision was given on the point of law, as to the Lords of the Treas- [★ 347] ury being liable there to a ★ mandamus; for the Attorney-General rested his opposition to the rule on that ground; and I thought we decided against him, and were right."

And in another case (*p*) still later, relating to Queen Adelaide's annuity, under 1 & 2 Wm. 4, c. 11, it was the opinion of the Court that that statute cast a specific duty on the Lords of the Treasury to grant a warrant for the amount due, and that a mandamus might be granted to them for the purpose (*q*).

But in *Ex parte Warmsley* (*r*), notwithstanding the words of 19 & 20 Viet. c. 108, s. 85, that the expenses of supplying county courts with books, stationery, &c., "shall be paid by the Commissioners of Her Majesty's Treasury out of any moneys to be from time to time provided by Parliament for such purposes;" and notwithstanding that, by the Appropriation Act, a sum for the purpose was voted, the Court held that a mandamus would not lie to the Commissioners to pay the amount of a printer and stationer's bill.

And in the case of an application for a mandamus, made in 1872 against the Lord Commissioners of the Treasury, to issue a Treasury minute authorizing the paymaster of civil contingencies to pay to a county treasurer out of the money granted by the Appropriation Act" for prosecutions at assizes and quarter sessions" sums which had been disallowed for the costs of certain prosecutions, the Court, consisting of Cockburn, C.J., Blackburn, Mellor, and Lush, JJ., though unanimously of opinion that the sums had been improperly disallowed, held that a mandamus would not lie to the Lords of the Treasury for the purpose of compelling payment. Cockburn, C.J., said that the case above cited of *R.* v. *The Lords Commissioners of the Treasury* was one of very doubtful authority, and it was decided (wrongly in his opinion) on the authority of a statute which had since been repealed (*s*).

(*o*) R. *v.* Commissioners of Woods, &c., 15 Q. B. 770.

(*p*) R. *v.* Lords of Treasury, 16 Q. B. 357.

(*q*) On this Blackburn, J., remarks: "It was not much argued, nor is it necessary to inquire whether that was mistaken or not; but it does seem doubtful, when one comes to look at the words, whether they were not misunderstood." (L. R. 7 Q. B. 399.)

(*r*) 1 B. & S. 81.

(*s*) R, *v.* Lords Commissioners of the Treasury, L. R. 7 Q. B. 387.

"Over the sovereign," said the Chief Justice, "we can have no power. In like manner, where the parties are acting as servants of the Crown, and are amenable to the Crown whose servants they ★ are, they [★ 348] are not amenable to us in the exercise of our prerogative jurisdiction."

"The general principle," said Blackburn, J., "not merely applicable to mandamus, but running through all the law, is, that where an obligation is cast upon the principal and not upon the servants, we cannot enforce it against the servant so long as he is merely acting as servant. . . . . The same principle applies to mandamus, if the duty is by statute, though perhaps 'duty' is hardly the word to employ with regard to Her Majesty. Where the intention of the Legislature shews that Her Majesty should be advised to do a thing, and where the obligation, if I may use the word, is cast upon the servants of Her Majesty so to advise, we cannot enforce that obligation against the servants by mandamus, merely because the sovereign happens to be the principal."

And the matter was thus put by Lush, J., with his usual terse precision:—"I think that the applicants have failed to make out that which is essential to entitle them to a writ of mandamus, namely, that there is a legal duty imposed upon the Lords of the Treasury—a duty as between them and the applicants—to pay over this sum of money. The only statute which can be brought to aid at all is the Appropriation Act; and that, as it seems to me, clearly shews that the money is voted to the Crown upon trust that the Crown will dispense it for certain specified purposes. When the money gets to the hands of the Lords Commissioners of the Treasury, who are responsible for dispensing it, it is in their hands as servants or agents of the Crown; and they are accountable, theoretically to the Crown, but practically to the House of Commons; and in no sense are they accountable to this or any other court of justice."

And in the latest case (in the Court of Appeal) bearing on the point (*t*), Brett, L.J., said: "I must say frankly that, sitting here, I consider that the case of *R.* v. *The Lords Commissioners of the Treasury* (*u*) cannot be maintained on any ground;" an opinion concurred in by Bowen, L.J.

The Lords of the Treasury as an appellate tribunal

(*t*) *Re* Nathan, L. R. 12 Q. B. D. 476, 480.
(*u*) 4 A. & E. 286.

to determine the amount of compensation to which persons were entitled for the abolition of their offices by [★ 349] the Municipal Reform Act of 5 & 6 ★ Wm. 4, c. 76, would have been liable to a mandamus if they refused to hear an appeal (*x*)

Lords of the Admiralty.—A mandamus to the Lords of the Admiralty, as servants of the Crown, would now doubtless be refused on grounds similar to those above stated, though there is no express authority to this effect.

The Court refused a mandamus to compel them to pay to the administratrix of a deceased naval officer sums alleged to have been wrongfully deducted by them from his half-pay; but only on the ground that there was no legal right to the half-pay—not on the broad ground that no mandamus would lie (*y*),

A mandamus to compel them to settle the prices at which the patentee was to supply them with a patented article was also refused; but only on the grounds that the application was not warranted by the terms of the patent, and that a mandamus would not lie to a public board to carry a contract into effect (*z*).

Commissioners of Woods and Forests.—The point was again distinctly raised in the case of an application against the Commissioners of Woods and Forests, for a mandamus to compel them to summon a jury under 9 & 10 Vict, c. 38, s. 15, to assess compensation for the land of a person which they had given him notice of their intention to take under that Act, for the purpose of forming Battersea Park; but the Court evaded the point, and decided the case on another ground, viz., that in the case of commissioners for the public, having a limited power of taking land, provided the required quantity can be taken for a given sum, a notice to treat is not like one given by a private company; it only opens a treaty, and does not complete a contract (*a*).

A mandamus to compel them to pay a poor rate, in respect of certain lands held by them, was refused on the ground that the lands were in their possession either as private individuals or for the Sovereign: in the former case, the remedy was by distress warrant; in the latter case the lands were not rateable (*b*).

(*x*) See R. *v.* Lords of Treasury, 10 A. & E. 374; 2 P. & D. 502.

(*y*) *Ex parte* Ricketts, 4 A. & E. 999.

(*z*) *Ex parte* Pering, 4 A & E. 949.

(*a*) R. *v.* Commissioners of Woods and Forests, 15 Q. B. 761; 19 L. J. Q. B. 497; 17 L. J. Q. B. 341.

(*b*) *Ex parte* Reeve, 5 D. 668.

Commissioners of Customs.—So also with respect to Commissioners ★ of Customs. A mandamus [★ 350] was refused to compel them to deliver up goods detained for payment of the full duty, which the applicant contended had been tendered (*c*). Lord Denman said that if the officer was not justified in what he did, mandamus was not the proper remedy; and Littledale, J., added that the goods being in the hands of officers of the Crown, a mandamus to them would be like a mandamus to the Crown, which could not be granted.

Commissioners of Inland Revenue.—On the same ground a mandamus was refused to compel the Commissioners of Inland Revenue to repay to the applicant the amount of probate duty alleged to have been overpaid by him; the remedy, if any, being by petition of right (*d*).

Commissioners of Excise.—The point was raised in one case as to Commissioners of Excise, but it became unnecessary to decide it (*e*).

A mandamus was granted to Commissioners of Appeal in matters of excise to hear an appeal from a conviction by Commissioners of Excise (*f*).

Local Government Board.—A mandamus was granted to the Local Government Board (who made an objection to the method of procedure by mandamus) to entertain and determine an application for a provisional order, declaring a disturnpiked road to be an ordinary highway, under sect. 16 of 41 & 42 Vict. c. 77 (*g*); also to inquire into, assess and make an award of compensation to a person for the loss of his office, by reason of the operation of the Metropolitan Poor Act, 1867 (30 Vict. c. 6) (*h*).

Postmaster-General.

A mandamus was granted to the Postmaster-General to compel him to assess compensation to a clerk belonging to one of the telegraph companies, whose undertakings were purchased by the Postmaster-General, under 31 & 32 Vict, c. 110, s. 8 (*i*).

Election commissioners.

A mandamus was in one case granted to compel commissioners appointed to inquire into the existence of

(*c*) R. *v.* Commissioners of Customs, 5 A. & E. 380.

(*d*) *Re* Nathan, L. R. 12 Q. B. D. 461 ; cf. R. *v.* Commissioners of Stamps and Taxes, 9 Q. B. 637.

(*e*) R. *v.* Excise Commissioners, 6 Q. B. 981, note (*b*). See S. *v.* S., 2 T. R. 381, and *Re* Heward, 2 D. & L. 753; 14 L. J. Q. B. 113.

(*f*) R. *v.* Commissioners of Appeal, &c., 3 M. & S. 133.

(*g*) R. *v.* Local Government Board, L. R. 15 Q. B. D. 70.

(*h*) R. *v.* Local Government Board, L. R. 9 Q. B. 148.

(*i*) R. *v.* Postmaster-General, L. R. 1 Q. B. D. 658, 3 Q. B. D. 429.

[★351] corrupt practices in a ★parliamentary borough, to give a certificate of idemnity to a witness who, under 26 & 27 Vict. c. 29, s. 7, had been required to answer questions, the answers to which might criminate or tend to criminate him, and had answered all such questions (*k*). In a later case (*l*), a similar application was refused, but only on the ground that, in the opinion of the Court the witness had equivocated and had not answered as required by statute. The question came finally before the Court of Appeal in *R.* v. *Holl* (*m*), where a mandamus was refused, on the broad ground that the decision of the commissioners in declining to grant a certificate is conclusive.

Bramwell, L. J., there points out the nature of the certificate to be given by the commissioners: "The certificate is to be a certificate stating that such a witness was required to answer questions, the answers to which criminated or tended to criminate him, and had answed all such questions. That means 'and had truly.' that is to say 'honestly,' answered all such questions. But for them to certify that the man has truly answered all such questions is to certify that, in their opinion and judgment, he has done so. It is not certifying to a mere matter of fact, which requires no opinion or judgment upon it, as that the man was sworn, or that he gave his evidence in a black coat, or anything of that sort; but it is the expression of a judgment or opinion that he had *bonâ fide* answered all those questions, the answers to which criminated or tended to criminate him. It cannot be otherwise. If the certificate of the commissioners is to be an expression of their judgment and opinion, how can you substitute the judgment and opinion of any other tribunal?"

Railway commissioners

Wherever there is a right to have a case stated by the Railway Commissioners a mandamus would lie to compel them to state one (*n*).

[★352] ★Whether a railway company does or does not give an undue preference is a question of fact

(*k*) R. *v.* Price, L. R. 6 Q. B. 411.

(*l*) R. *v.* Burrows, L. R. 7 Q. B. D. 577, note. The Court said they did not consider this case as conflicting with R. *v.* Price, as in that case the examination before the commissioners had not been conducted in a satisfactory manner, and the Court therefore thought it proper that there should be an inquiry under the mandamus whether the witness had or had not honestly answered the questions.

(*m*) L. R. 7 Q. B. D. 575.

(*n*) See Denaby, &c., Co. *v.* Manchester, &c., Railway Co., 3 N. & M. Ry. Cas. 426, 441; Central Wales, &c., Railway Co. *v.* Great Western Railway Co., 2 N. & M. Ry. Cas. 200, 201.

and not of law, for the determination of the commissioners (*o*).

Universities and colleges.

There are instances in early times of mandamuses to restore a person banished from a university (*p*), a scholar suspended (*q*), and a person deprived of his degrees (*r*); also to remove a scholar for being a Lollard (*s*); and in one case (*t*) it was said that a mandamus would be granted to compel admission to a degree for which the applicant had duly qualified himself. But it may now be considered established that the Court will not interfere in any matter which is properly the subject of cognisance by the visitor or visitors, and which has in due form been adjudicated upon by him or them. See the remarks *ante*, pp. 237, 258, 280, and the cases there referred to.

Nor will the Court interfere with the mode of procedure adopted by the visitor or the form in which evidence is given (*u*).

But if a visitor refuses to hear and adjudicate upon an appeal properly brought, he may be compelled to do so by mandamus (*x*).

And where the visitor was also the head of the college, the visitatorial power was held to be suspended, and a mandamus was granted to admit a chaplain (*y*).

A mandamus was held to lie to the keepers of the common seal of a university, commanding them to put it to the instrument of appointment of their high steward, pursuant to a grace passed in senate (*z*).

In the case of a college where there was no special visitor appointed by the founder, the Court refused to interfere by mandamus to compel the college to proceed to an election of a fellow; the right of visitation in such a case devolving upon the Crown, to be exercised by the great seal (*a*).

But the Court has power to review by mandamus the decision of ★ the Hebdomadal Council in [★ 353] revising the register of "residents," under 17 & 18 Vict. c. 81, ss. 14–16 (*b*).

(*o*) Id. (*p*) Vide *ante*, p. 224, note (*f*).
(*q*) See Sir T. Ray. 110.
(*r*) See R. *v.* Cambridge, 8 Mod. 148. (*s*) Sir T. Ray. 110.
(*t*) 8 Mod. 151. See also Sir T. Ray. 110.
(*u*) R. *v.* Ely, 5 T. R. 475.
(*x*) R. *v.* Lincoln, 2 T. R. 338, note. R. *v.* Ely, 5 T. R. 474; Usher's case, 5 Mod. 453; R. *v.* Visitors of Trinity College, Dublin, 9 Ir. C. L. R. 41.
(*y*) R. *v.* Chester, 2 Str. 797.
(*z*) R. *v.* Cambridge, 3 Burr. 1647.
(*a*) R. *v.* St. Catharine's Hall, 4 T. R. 233, 245.
(*b*) R. *v.* Vice-Chancellor of Oxford, L. R. 7 Q. B. 471.

Bishop and Archbishop.

In one case a mandamus is said to have gone to command a bishop to confirm children (*c*).

And in a case relating to a curate of a chapel donative, who had been wrongfully dispossessed, Lord Mansfield said that if the bishop had refused *without cause* to license him, he might have had a mandamus to compel the ordinary to license him (*d*). But the decision of the bishop as to the personal fitness of the candidate for any office under his control is never interfered with (*e*).

It seems that it is imperative on the archbishop, under 25 Hen. 8, c. 20, to confirm the election of a person who, in pursuance of letters missive and *congé d'élire*, has been elected bishop by the dean and chapter; and a mandamus to compel the hearing of objections to the confirmation of the appointment was refused (*f*).

A mandamus was granted to compel a bishop to allow inspection of his register of presentations and institutions to a living in his diocese, by a person claiming the right of patronage against the bishop (*g*).

A bishop to whom complaint is made against a clergyman for on offence under the Church Discipline Act, 3 & 4 Vict. c. 86, s. 3, has a discretion whether he will issue a commission under that Act; and the Court will not interfere by mandamus with the exercise of that discretion, whether the complaint be made by a parishioner of the clergyman or by a stranger to the parish and diocese (*h*).

(*c*) Case of Dean of St. Burian's, Fitz. N. B. 200; 2 Keb. 66.

(*d*) R. *v.* Blooer, 2 Burr. 1045.

(*e*) R. *v.* Archbishop of Canterbury, 15 East, 117, 124; R. *v.* Bishop of London, 13 East, 418. See the other cases cited, *ante*, pp. 260, 261.

(*f*) R. *v.* Archbishop of Canterbury, 11 Q. B. 483.

(*g*) R. *v.* Bishop of Ely, 8 B. & C. 112.

(*h*) R. *v.* Bishop of Oxford, L. R. 5 Ap. Cas. 214; R. *v.* Bishop of Chichester, 2 E. & E. 209. The latter case was argued before Lord Campbell, C.J., Wightman, Erle, and Hill, JJ.; but before judgment was delivered Lord Campbell had become Lord Chancellor, and Erle, J., Chief Justice of the Common Pleas. The judgment of Wightman, J., proceeded on the ground that the bishop had a discretion which could not be controlled by mandamus; that of Hill, J., on the ground of want of personal interest in the applicant. Though the assent of Lord Campbell and Erle, C.J., is stated to have been given to the decision of the Court, it is not stated on which ground they concurred; and it appears that Erle, C.J., subsequently disclaimed having acted on the ground relied on by Wightman, J. (see the judgment in R. *v.* Bishop of Oxford, L. R. 4 Q. B. D. 253, 254), whereas Lord Campbell appears to have agreed with Wightman, J. (See judgment in same case, on appeal, L. R. 4 Q. B. D. 548, and in the House of Lords, L. R. 5 App. Cas. 239.)

★ When the bishop had issued a commis- [★ 354] sion under this Act, and the complainant desired to proceed against the accused, it was held that the bishop was bound, under ss. 9 and 11, to require the appearance of the accused, and to hear and pronounce sentence; and a mandamus to compel him to do so was granted (*i*).

A mandamus was also granted to compel an archbishop to hear and determine, under 1 & 2 Vict. 106, s. 98, the appeal of a curate whose license had been revoked by his bishop (*k*). Confirming or annulling the revocation merely upon the statements made by the curate in his petition of appeal, and the written documents referred to in such petition, but without giving the appellant an opportunity of being heard either in person or by counsel, was held not to be a hearing and determining of the appeal (*l*).

2. To Public Officers.

Mandamuses have also been granted to compel the performance of their duties by public officers, even where they are liable to a penalty for neglect (*m*); *e.g.*, to compel public officers to deliver to their duly appointed successors the books, records, &c., belonging to the office (*n*). And there is no doubt that the Court would compel a public officer to deposit a public document in the place where any statute directs it to be deposited (*o*).

For examples of mandamuses to municipal officers, see "Municipal Corporations," *ante*, pp. 323 *et seq.* Municipal officers.

★ A mandamus was granted to compel a [★ 355] lord lieutenant to declare vacant commissions in the militia (*p*). Lord lieutenant.

Also to compel a sheriff to execute a compensation inquiry under the Lands Clauses Consolidation Act, Sheriff.

(*i*) R. *v.* Archbishop of Canterbury, 6 E. & B. 546.

(*k*) R. *v.* Archbishop of Canterbury, 1 E. & E. 545.

(*l*) Ib. Contrast R. *v.* Bishop of Ely, 5 T. R. 475, where all the parties agreed to conduct the appeal in writing, and the appellant made no request for an oral hearing.

(*m*) R. *v.* Everet, Cas. t. Hard. 261.

(*n*) R. *v.* Buller, 8 East, 389 (mayor); cf. R. *v.* Greene, 6 A. & E. 548; R. *v.* Clapham, 1 Wils. 305 (overseers); R. *v.* Wildman, 2 Str. 879 (clerk to Blacksmiths' Company); Crawford *v.* Powell, 2 Burr. 1013 (town clerk), and see town clerk of Nottingham's case, 1 Sid. 31; Anon., 1 Barn. 402 (as to books belonging to the Blacksmith's Company, London), and R. *v.* Hopkins, 1 Q. B. 161 (as to the books of a court of requests).

(*o*) *Per* Coleridge, J., R. *v.* Payn, 6 A. & E. 402.

(*p*) 1 Gude's C. P. 206.

1845 (*q*): and to compel old sheriffs to deliver over the rolls to the new ones (*r*).

Treasurer of a county or town.

A mandamus was granted to compel the treasurer of the County Palatine of Lancaster to pay the amount required by order of special sessions, under 1 & 2 Wm. 4, c. 41, s. 13, for the services of certain special constables called out and appointed (*s*); also to compel a county treasurer to pay to the clerk of the sessions money to which he was entitled under an Act of Parliament (*t*).

The practice of the Courts has not been uniform with regard to compelling a county or borough treasurer to pay the costs of a prosecution, pursuant to an order of sessions or of a judge of assize. In *R.* v. *Surrey* (*u*), and *R.* v. *Jeyes* (*x*), a mandamus for the purpose was refused, on the ground that the proper remedy was by indictment. In *R.* v. *Clark* (*y*) the mandamus appears to have been refused solely on the ground that the judge had, under sect 95 of 5 & 6 Wm. 4, c. 50, only directed in general terms that the costs should be paid, and that a mandamus could not go for a sum not ascertained. In the later case of *R.* v. *The Treasurer of Oswestry* (*z*), where the order of the judge of assize (under sect. 24 of 7 Geo. 4, c. 64), for the payment by a borough treasurer of the costs of a prosecutor and his witnesses, does not seem to have been for any ascertained sum, a mandamus to compel the treasurer to pay was granted.

The treasurer of a county or town has in several cases been regarded as an inferior officer, amenable to others, and his disobedience is an offence for which the appropriate remedy is by indictment (*a*); but those were cases in which [★ 356] an order had been ★ given him by the proper authority, which order he had disobeyed. Where no order has been issued to him, or where the magistrates, equally with himself, have made a mistake, a mandamus may be granted, *e.g.* to compel the treasurer to deposit with the clerk of the peace the books of entries of sums received and paid by him (*b*). "The result of the cases cited," said Coleridge, J. (*c*), "appears to be

(*q*) Walker *v.* London & Blackwall Railway Co., 3 Q. B. 744; cf. Amhurst's case, 2 Keb. 871.
(*r*) Case of Sheriffs of Nottingham cited, Hurst's case, 1 Keb. 387.
(*s*) R. *v.* Hulton, 13 Q. B. 592.
(*t*) R. *v.* Baker, 7 A. & E. 502. (*u*) 1 Chitt. 650.
(*x*) 3 A. & E. 416. (*y*) 5 Q. B. 887. (*z*) 12 Q. B. 239.
(*a*) R. *v.* Surrey, 1 Chitt. 650, citing R. *v.* Johnson, 4 M. & S. 515. See also R. *v.* Jeyes, 3 A. & E. 416; R. *v.* Bristow, 6 T. R. 168; R. *v.* Shaw, 5 T. R. 549.
(*b*) R. *v.* Payn, 6 A. & E. 392. (*c*) Id. 401.

merely this: that where we find a public officer who has received an order from his masters or any competent authority, and who upon disobeying that order will be liable to indictment, we do not proceed by mandamus; not because the party is too low, but because he has received an order from competent authority. Here the magistrates have issued no order; and this distinguishes the case from *R.* v. *Bristowe* and *R.* v. *Jeyes*, in one of which there was an order by the magistrates, and in the other an order by the judge of assize."

As to payment of compensation to coroners for loss of emoluments arising out of changes made by 7 & 8 Vict. c. 92, see *R.* v. *Lechmere* (*d*).

Parish officers.

A mandamus would be granted to compel overseers to alter certain rates in conformity with the amendment of the assessment committee (*e*); but not to compel them to make and send to the assessment committee a provisional list under sect. 47 of the Valuation (Metropolis) Act, 1869, on the alleged ground that the value has been increased or diminished during the year, if the overseers are of opinion that no such alteration in value has taken place (*f*).

A mandamus was granted to compel them, under 9 Geo. 1, c. 7, s. 4, to pay money contracted to be paid to the applicant for maintaining and employing the poor of a parish (*g*); to compel overseers of a parish in a union to pay to its treasurer the amount to be contributed by the parish, and in case they had not in hand sufficient funds for the purpose, forthwith to do what was necessary for having a rate made, collected, and levied for the purpose (*h*); to compel them to obey an order of the burial board ★ of a con- [★ 357] solidated chapelry for the payment of a proportion of the expenses incurred in respect of the burial ground (*i*); to pass their accounts (*k*), but not to furnish particulars of them to the auditor, as he has the remedy in his own hands, by disallowing charges of which particu-

(*d*) 16 Q. B. 284.
(*e*) R. *v.* Langriville, L. R. 14 Q. B. D. 83.
(*f*) R. *v.* Bermondsey, L. R. 14 Q. B. D. 351.
(*g*) R. *v.* Beeston, 3 T. R. 592.
(*h*) R. *v.* Todmorden, 1 Q. B. 185; R. *v.* St. Andrew, Holborn, 10 A. & E. 736. See and distinguish R. *v.* Bangor, 16 L. J. M. C. 58; R. *v.* Huddersfield, 1 B. & S. 961.
(*i*) R. *v.* South Weald, 5 B. & S. 391; R. *v.* Coleshill, 2 B. & S. 825; 4 B. & S. 667. See also R. *v.* Walcot, 2 B. & S. 555, 571.
(*k*) R. *v.* Shepton Mallett, 5 Mod. 421. See R. *v.* Worcestershire, 3 D. & R. 299.

lars are not given (*l*); to compel them to appoint a returning officer for an election of guardians, in obedience to an order of the Poor Law Commissioners (*m*); to compel the overseers, churchwardens, and inhabitants generally of a parish to call a vestry and make a rate for the repair of a parish church under a local Act (*n*); to compel them to allow a rated parishioner inspection of the parish books of accounts of receipts and expenditure (*o*); to compel the officers of a parish included in a union to pay a sum out of the poor rates collected by them to the treasurer of the union (*p*); and to account to an auditor appointed by the Poor Law Commissioners (*q*); to compel the old overseer to deliver over the parish books and moneys to his successor (*r*); to compel overseers to restore a collector of rates improperly removed (*s*); but not to produce their own appointment for the inspection of a rated inhabitant, the application being a merely fishing one to find out defects (*t*); nor to compel them to certify (under 3 & 4 Vict. c. 61, s. 2) that a particular person applying for a license to retail beer in a dwelling-house is the real resident, holder, and occupier of the house, as they have a discretion in the matter (*u*).

As to making a rate to provide for the expenses of a survey of the parish ordered by the Poor Law Commissioners, see *R.* v. *The Churchwardens and Overseers of Bangor* (*x*).

The Court refused a mandamus to compel the church-
[★ 358] wardens, ★overseers, &c., of a parish to make a rate to reimburse a former overseer moneys of his own expended for the relief of the poor: during his continuance in office he ought to have got a rate for the relief of the poor, and reimbursed himself thereout (*y*).

And a mandamus would not be granted to compel parish officers to receive a pauper in obedience to an order of removal, the proper remedy being by indictment (*z*).

(*l*) R. *v.* Halifax, 10 L. J. M. C. 81.
(*m*) R. *v.* Oldham, 10 Q. B. 700.
(*n*) R. *v.* St. Saviour's, 7 A. & E. 925.
(*o*) R. *v.* Great Faringdon, 9 B. & C. 541.
(*p*) R. *v.* St. Andrews, 10 A. & E. 738.
(*q*) Id. 13 L. J. Q. B. 341.
(*r*) R. *v.* Clapham, 1 Wils. 305; R. *v.* Simms, 4 D. 294.
(*s*) R. *v.* Christchurch, 7 E. & B. 409.
(*t*) R. *v.* Harrison, 16 L. J. M. C. 33.
(*u*) R. *v.* Kensington, 12 Q. B. 654.
(*x*) 10 Q. B. 91.
(*y*) R. *v.* Littleport, 6 Mod. 97; R. *v.* Rotherhithe, 8 Mod. 339.
(*z*) *Ex parte* Downton, 8 E. & B. 856.

Surveyors.

Mandamuses have issued to compel a surveyor of highways to pay money due to the prosecutor, under contracts with road trustees, for the rent of lands taken by them (*a*); to compel a surveyor, who had improperly allowed the time for producing and passing his accounts to elapse, to produce and pass them (*b*); to compel the surveyor of highways of a parish to deliver up, at the expiration of his office, to the proper custody (*i. e.*, the churchwardens of the parish) the books of accounts, assessments, rates, and other documents relating to the highways (*c*); to compel a surveyor and commissioner under an inclosure Act to inquire into the existence of a modus (*d*); to compel him to make a road pursuant to a plan annexed to an order of quarter sessions (*e*).

Coroners.

A mandamus to compel a coroner to proceed with an adjourned inquest was refused, where the inquest had been taken not *super visum corporis*, and therefore not in the manner required by law (*g*); the Court being of opinion that the proceeding was irregular from its commencement.

A mandamus will lie to quarter sessions to compel the allowance of a coroner's proper charges (*h*), where the disallowance is not in the exercise of a discretion properly belonging to that body (*i*); but not where it is (*k*).

Gaolers.

A mandamus, peremptory in the first instance, was granted to compel a gaoler to deliver up to the executors of the deceased ★the body of a prisoner [★ 359] who died in gaol (*l*). A mandamus would be granted to compel a gaoler to receive a prisoner whom he improperly refused to receive (*m*); but not to compel him to make allowances to a prisoner out of funds specified

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(*a*) R. *v.* Baldwin, 8 A. & E. 947.
(*b*) R. *v.* Lewis, 1 D. 530.
(*c*) R. *v.* Round, 4 A. & E. 139.
(*d*) Anon., 2. Chitt. 251.
(*e*) R. *v.* Wood Ditton, 18 L. J. M. C. 218.
(*g*) R. *v.* Ferrand, 3 B. & Ald. 260.
(*h*) R. *v.* Carmarthenshire, 16 L. J. M. C. 167. See also R. *v.* Kent, 11 East, 229; R. *v.* Warwickshire, 5 B. & C. 430; R. *v.* Oxfordshire, 2 B. & Ald. 203; and distinguish R. *v.* West Riding, 7 T. R. 52.
(*i*) Ib.
(*k*) R. *v.* Gloucestershire, 7 E. & B. 805.
(*l*) R. *v.* Fox, 2 Q. B. 246. It seems that the gaoler might also be indicted for his refusal. R. *v.* Scott, id. 248.
(*m*) See R. *v.* Governors of Middlesex House of Correction, 2 N. & M. 138; R. *v.* Governors of Coldbath Fields, 6 B. & S. 352; R. *v.* Whitecross Street, and R. *v.* Newgate, 6 B. & S. 372, 379.

in 5 & 6 Vict. c. 22, these funds being under the control of the Secretary of State (*n*).

Savings bank managers, directors, &c.

A mandamus was granted to compel the trustees and managers of a savings bank to appoint an arbitrator under the repealed Act 57 Geo. 3, c. 130 (*o*).

Collector of excise.

A mandamus was granted to compel a collector of excise to administer the oath entitling the shipper of beer, under 38 Geo. 3, c. 54, s. 4, to obtain a drawback (*p*).

Registration officers.

A mandamus would, if necessary, be granted to compel the register of deeds in the Register Counties to register the memorials of deeds, wills, &c. (*q*); and to compel the registrar of joint stock companies to register a company properly coming within the Companies Act (*r*), but not to register under a new name a company already completely registered (*s*).

But the Court has no power to order a district registrar of births and deaths to erase even the fraudulent entry of the birth of a supposititious child (*t*). Nor will a mandamus be granted to compel the superintendent registrar of marriages to grant a certificate for a marriage out of his district (*u*).

A mandamus was granted to compel a person who had been registrar of a consistory court, to deliver over all the public books and records to his successor (*x*).

Under the repealed Act 8 & 9 Vict. c. 89, a mandamus [★ 360] was ★ granted to compel the registration by the proper officers of a British ship (*y*).

As to the duty of the registrar of friendly societies, see *R.* v. *Registrar of Friendly Societies* (*z*).

(*n*) *Re* Long, 14 L. J. Q. B. 23, 146.

(*o*) R. *v.* Mildenhall Savings Bank, 6 A. & E. 952; R. *v.* Cheadle Savings Bank, 1 A. & E. 323, n.; 3 N. & M. 418, n. See also R. *v.* Witham, 1 A. & E. 321; 3 N. & M. 416; R. *v.* Northwich, 9 A. & E. 729; and cf. Crisp *v.* Bunbury, 8 Bing. 394.

(*p*) R. *v.* Cookson, 16 East, 376.

(*q*) See R. *v.* Middlesex, 7 Q. B. 156; S. *v.* S., 1 E. & E. 322.

(*r*) R. *v.* Whitmarsh, 15 Q. B. 600, 14 Q. B. 803.

(*s*) R. *v.* Registrar of Joint Stock Companies, 10 Q. B. 839.

(*t*) *Ex parte* Stanford, 1 Q. B. 886.

(*u*) *Ex parte* Brady, 8 D. 332.

(*x*) R. *v.* Wheeler, Cas. t. Hard. 99.

(*y*) R. *v.* Arnaud, 9 Q. B. 806, 16 L. J. Q. B. 50. An appeal from the refusal of the registrar is now given to the Commissioners of Customs. See also R. *v.* London Customs Collector, 1 M. & S. 262; R. *v.* Liverpool Customs Collector, 2 M. & S. 223.

(*z*) L. R. 7 Q. B. 741. See also R. *v.* Tidd Pratt, 6 B. & S. 672, and R. *v.* Littledale, Ir. L. R. 12 Q. B. D. 97. Before the central system of registration was established, the enrolment by quarter sessions of the rules of friendly societies was enforced, when necessary, by mandamus; see R. *v.* Staffordshire, 12 East, 280; R. *v.* Somerset, 1 N. & M. 252.

For an example of mandamus to the registrar of the Pharmaceutical Society of Great Britain, see 6 E. & B. 138.

Friendly society.

A mandamus was granted to compel the secretary of a friendly society to convene a meeting for the purpose of altering or rescinding rules, in compliance with a requisition duly signed under 10 Geo. 4, c. 56, s. 9 (*a*).

Masters of the High Court.

Mandamuses have been granted to compel Masters of the High Court of Justice to tax the costs of the party entitled to them under sect. 51 of the Lands Clauses Consolidation Act, 1845 (*b*).

(*a*) R. *v.* Bannatyne, 17 Q. B. 524.

(*b*) R. *v.* Manley Smith, L. R. 12 Q. B. D. 481 ; Pearson *v.* Great Northern Railway Co., L. R. 7 Q. B. 785, n. Cf. Armytage *v.* Wilkinson, L. R. 3 App. Cas. 355; Bell *v.* Master in Equity, id. 2 App. Cas. 563. See the Irish case of *Re* Scully, 11 Ir. C. L. R. 292, where Crampton, J., said that there never was a case in which the Court issued a mandamus to its own officer.

[★361] ★CHAPTER VII.

PROCEDURE TO OBTAIN THE WRIT.

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Application how to be made.

By No. 60 of the New Crown Office Rules, an application for a prerogative writ of mandamus (*a*) must, during the sittings, be made to a Divisional Court of the Queen's Bench Division by motion for an order *nisi*. But this does not apply to an application for a writ of mandamus to proceed to the election of a corporate officer under the Municipal Corporations Act, 1882 (*b*).

As, by Order LXVIII., r. 2, of the Supreme Court Rules and Orders, the provisions of Order LII. are made applicable to mandamus, and rule 2 of Order LII. saves the practice then existing of a rule or order being in some cases made absolute *ex parte* in the first instance, it will doubtless be held that (notwithstanding the wording of the new Crown Office Rule above set forth) the Court may still, if so minded, grant an order absolute in the first instance.

[★362] ★In the vacation the application may be made to a Judge in Chambers (*c*) for a summons to

(*a*) An application for an order in the nature of a mandamus to justices, or to a county court judge, or to justices to state and sign a case, shall be by motion for an order *nisi*, in the same manner as is provided in Rule 60 (C. O. R. 80).

(*b*) Id.

(*c*) "Judge at Chambers," includes a judge at Chambers in London or elsewhere (C. O. R. 306).

shew cause, upon its being shewn to the satisfaction of such judge, that the matter is urgent (*d*). The leave of a judge must be obtained before the summons issues (*e*).

In all proceedings on the Crown side at Chambers, the summons is to be issued from, and the order drawn up at the Crown Office (*f*).

By whom to be made.

It was laid down by the Court in 1819 (*g*), as a general rule applicable to all proceedings in the name of the sovereign, that no private individual would be heard as an advocate in a court of justice; and this rule has often been acted on since in cases of application for a criminal information. On the other hand, though I can find no reported case where a prosecutor in person has been allowed to move for a mandamus (*h*), the rule has not been applied where the application is against justices for a rule to hear and determine (*i*); and it is doubtful whether the old rule will be rigidly enforced in future.

When to be made.

The general rule is that the application must be made within a reasonable time after demand and refusal. It may be refused if made too soon (vide *ante*, p. 251), and has frequently been rejected on the ground of unexplained delay (vide *ante*, p. 250).

A person whose claim has been rejected or name expunged at the revision of burgess lists must make his application for a mandamus within two months after the last sitting of the revision Court (*k*).

Every application for a writ of mandamus to justices to enter continuances and hear an appeal must be made within two calendar months after the first day of the sessions at which the refusal to hear took place, unless further time be allowed ★ by the Court or [★ 363] a judge or unless special circumstances appear by affidavit to account for the delay to the satisfaction of the Court (*l*).

Notice.

Notice of the intended application must be given in certain cases.

Thus, in the case of an application for a mandamus to proceed to an election of a corporate officer, the ap-

(*d*) C. O. R. 60. (*e*) Id. 305. (*f*) Id. 304.

(*g*) R. *v.* Lancashire, 1 Chitt. 602, where the application was for a criminal information against justices. See also R. *v.* Brice, 2 B. & Ald. 606, and *ante*, p. 52.

(*h*) In *Ex parte* Wason (see 10 B. & S. 582), the applicant who moved in person was a member of the Bar.

(*i*) See R. *v.* Biron, L. R. 14 Q. B. D. 474; 51 L. T. N. S. 429.

(*k*) 45 & 46 Vict. c. 50, s. 47.

(*l*) C. O. R. 79. The former rule will be found in E. B. & E. 255.

plicant must give notice in writing of the application to the person to be affected thereby (the respondent), at any time not less than two days before the day in the notice specified for making the application; which notice must set forth the name and description of the applicant, and a statement of the grounds of the application (*m*). The applicant in such a case must also serve with the notice a copy of the affidavits, whereby the application will be supported (*n*).

In those cases in which a rule absolute in the first instance was desired, notice was usually given to the party applied against, and the fact of its having been given verified by affidavit (*o*).

Who may apply.

Only those who have a direct interest in having the duty performed, and as to, or towards whom, the party proceeded against is under an obligation to perform it, are considered entitled to apply for a mandamus (*p*).

The duty may, however, be such as is owed to all the ratepayers of a town, hamlet, or district (*q*); or to a body of men, as the millers (*r*), or weavers (*s*) of a county.

A person outlawed cannot obtain the writ until his outlawry has been reversed (*t*).

One of those to whom the writ is to be directed may be prosecutor. Thus one of two overseers and churchwardens of a parish, where the other had wrongfully [★ 364] refused to concur in making a ★ rate, obtained a mandamus addressed to the overseers and churchwardens to make the rate (*u*).

The successful prosecutor of a *quo warranto* information has been held entitled to priority over the defendant in moving for a mandamus for a new election; but if the prosecutor does not move within a reasonable time, then the defendant may make the application (*x*).

Where, on the single affidavit of the clerk of one of the two solicitors to a bill for the construction of water-

(*m*) 45 & 46 Vict. c. 50, s. 225. (*n*) Id.

(*o*) See *Ex parte* Winfield, 3 A. & E. 614.

(*p*) See R. *v.* Frost, 8 A & E. 822; R. *v.* Lords of Treasury, L. R. 7 Q. B. 387; R. *v* Bishop of Chichester, 2 E. & E. 209.

(*q*) See R. *v.* Westmoreland, 1 Wils. 138.

(*r*) R. *v.* Kent, 14 East, 395; and cf. R. *v.* Nottingham, Bull. N. P. 201.

(*s*) R. *v.* Cumberland, 1 M. & S. 190.

(*t*) R. *v.* Bristol, 1 Show. 288; Carth. 199.

(*u*) R. *v.* Gadsby, 1 N. & P. 575. See also Anon., 2 Chitt. 254, where the Court said that this had often been done.

(*x*) R. *v.* McKay, 4 B. & C. 658; R. *v.* Mears, id. 659; R. *v.* West Loe, Burr. 1386.

works in a borough, a rule for a mandamus was moved for, to compel the mayor to hold a second meeting of the ratepayers, on the ground that he had wrongfully refused a poll at the previous meeting (which passed a resolution that the bill should be opposed at the charge of the ratepayers), Blackburn, J., in the Bail Court refused the rule, on the ground that the party "should, in the first instance, shew that he is really applying in the interests of the owners and ratepayers; it ought also be shewn by affidavit who is the real applicant, in order that he may be made responsible for costs (*y*).

A single mandamus should not be applied for by several persons for the enforcement of several claims, although they have occupied in succession the same office in respect of which the claims arise (*z*).

Against whom application is to be made.

As to the persons against whom the application should be made, no more precise rule can be laid down than this: All those should be applied against on whom the duty of obeying the writ will be cast should a mandamus be granted; even though the application be made by some of them (*a*).

If certain of the magistrates present at a special sessions take no part in the decision of the sessions, they ought not to be brought before the Court on an application for a mandamus in respect of that decision (*b*).

It is not necessary to bring before the Court all the magistrates who actually do take part in a decision; but if the Court sees that ★ some are selected [★ 365] and some omitted for an improper purpose, it would require that all who were parties to the decision should be joined (*c*).

The lord of the manor and the steward should both be made parties, where the application is to compel acceptance of a customary surrender (*d*). So should all the justices of the county, where the application is to enforce the performance of a duty by quarter sessions (*e*).

The application to restore a parish clerk should be against the incumbent, not the churchwardens (*f*).

The actual occupant of an office should be made party to a rule to compel a new election to it (*g*).

(*y*) R. *v.* Peterborough, 44 L. J. Q. B. 85.
(*z*) *Ex parte* Scott, 8 Dowl. 328.
(*a*) See Anon., 2 Chitt. 254. (*b*) R. *v.* Wilts, 8 Dowl. 717.
(*c*) R. *v.* Ellis, 2 D. N. S. 361.
(*d*) R. *v.* Evans, 1 Q. B. 355; 7 D. 709; R. *v.* Powell, 1 Q. B. 352.
(*e*) See the cases referred to *ante*, pp. 301 *et seq.*
(*f*) *Ex parte* Cirkett, 3 D. 327.
(*g*) R. *v.* Bankes, Burr. 1453.

Affidavit by prosecutor.

No order for the issuing of any writ of mandamus shall be granted unless, at the time of moving, an affidavit be produced by which some person shall depose upon oath that such motion is made at his instance as prosecutor; and, if the writ be granted, the name of such person shall be endorsed on the writ as the person at whose instance it is granted (*h*).

What the affidavits must shew.

The affidavit or affidavits in support of the motion should contain a statement of everything necessary to shew (1) a legal right on the part of the applicant to have the duty performed (*i*); (2) a demand by him to have it performed; (3) a refusal to perform it by the party moved against, either expressly or by equivalent conduct (*k*); (4) that notice has been given, where notice is necessary: and (5) it should also appear that the application has not, on the one hand, been unduly delayed (*l*), nor, on the other hand, been made prematurely (*m*); and (6), when the application is for the purpose of obtaining inspection of public documents, it is well to state the object with which inspection is sought (*n*). In brief, they should state facts sufficient, according to the principles already explained, to establish a *primâ facie* right to the relief asked for.

[★ 366] ★ The affidavits need not state that the applicant has no other effective remedy; but the facts stated should be such as to shew this, or at least to render it doubtful whether any other legal remedy exists (*o*).

When necessary, the charter of a corporation (*p*), or the statutes of a college, must be brought before the Court (*q*); and if the officer, in respect of which the application is made, is one of which judicial cognizance will not be taken, the nature of its duties should be sufficiently described (*r*).

(*h*) C. O. R. 76.

(*i*) See for example R. *v.* Archbishop of Canterbury, 8 East, 213, and *ante*, pp. 228 *et seq.*

(*k*) As to demand and refusal and what amounts to each, vide *ante*, pp. 247–249.

(*l*) Vide *ante*, p. 250.

(*m*) Vide *ante*, p. 251.

(*n*) Vide *ante*, pp. 265–267, and Lawless *v.* Commissioners of Police, 13 Ir. C. L. R. 367.

(*o*) R. *v.* Bristow, 6 T. R. 168; R. *v.* St. Katharine's Dock Co., 4 B. & Ad. 362; R. *v.* Stoke Damarel, 5 A. & E. 584; R. *v.* Nottingham Old Waterworks, 6 A. & E. 355.

(*p*) See case of Vintners' Company, Bull. N. P. 196.

(*q*) R. *v.* Archbishop of Canterbury, 7 Mod. 220.

(*r*) See R. *v.* Guildford, 1 Lev. 162; *Anon.*, 1 Barn. 153; *Anon.*, 2 Mod. 316.

It is best to annex a copy of every document of importance (*s*).

According to the obscure reports of some old cases, where a mandamus is prayed in a matter of right, as to restore a man to his office, an affidavit of the fact of his having been possessed of it and removed therefrom is not necessary; but an affidavit is necessary of a failure of duty on the part of justices (*t*).

Title, &c., of affidavits, swearing, filing, &c.

As to the title, form, and contents of affidavits, the manner, time, and place of swearing and filing them, &c., see the various rules set forth *ante*, pp. 41–44, which are applicable to all proceedings on the Crown side. See also the various rules of Order XXXVIII. of the Supreme Court Rules, 1883, which, so far as applicable, are to apply to all civil proceedings on the Crown side (*u*).

Affidavits to be used in moving for the order *nisi* should be entitled simply, "In the High Court of Justice, Queen's Bench Division" (*x*).

Order absolute in first instance.

In some cases the Court has been accustomed to grant an order absolute in the first instance (*y*), such as the following: to admit or swear into an office a person clearly entitled to it (*z*), but not ★ where the [★ 367] application was to restore to office (*a*); to compel justices to allow a poor rate (*b*), and to compel churchwardens and overseers to make one (*c*); to allow persons interested to examine parish or corporation books (*d*), or the rolls of a manor (*e*); to compel the reception by overseers of a deserted pauper child (*f*); to compel a gaoler to give up for burial the body of a debtor who died in prison (*g*); also where a mayor held over (*h*), or there was a vacancy by death (*i*), or where the election was absolutely void (*k*).

(*s*) See R. *v.* Simms, 4 D. 294; cf. Crosby *v.* Fortescue, 5 D. 273.

(*t*) R. *v.* Cory, 3 Salk. 230; R. *v.* Cutlers' Co., Cas. t. Hard. 129: *per* Lee, J., *Anon.*, 2 Barn. 235.

(*u*) C. O. R. 5. (*x*) Id. 7. (*y*) See the remarks *ante*, p. 361.

(*z*) *Anon.*, 1 Barn. 227; *Anon.*, 1 Chitt. 254. *Ex parte* Lowe, 4 D. 15; R. *v.* Manchester, 7 D. 707; *Ex parte* Winfield, 3 A. & E. 614; R. *v.* Coventry, 3 Doug. 236; R. *v.* Litchfield, 5 N. & M. 42; R. *v.* Mayor, &c., of York, 4 T. R. 699, 700.

(*a*) Buller, N. P. 199.

(*b*) R. *v.* Godolphin, 13 L. J. M. C. 57; R. *v.* Heydon, Say. 208.

(*c*) R. *v.* St. Andrew's, 7 A. & E. 281; R. *v.* Fisher, Say. 160.

(*d*) *Anon.*, 2 Chitt. 290; R. *v.* Shelley, 3 T. R. 141.

(*e*) R. *v.* Shelley, 3 T. R. 142, *per* Buller, J.; 2 W. Bl. 1030, 1031, note; 1 Reg. Gen. H. 2 Wm. 4, s. 102, 3 B. & Ad. 389; 1 D. 197; *Ex parte* Hutt, 7 D. 690; *Ex parte* Barnes, 2 D. N. S. 20; cf. *Ex parte* Best, 3 D. 38.

(*f*) *Ex parte* Foundling Hospital, 5 D. 722.

(*g*) R. *v.* Fox, 2 Q. B. 246.

(*h*) R. *v.* Mayor of Truro, 2 Chitt. 257.

(*i*) Ib. (*k*) R. *v.* Pembroke, 8 Dowl. 302.

Order *nisi*.

The order *nisi* calls on the party or parties to shew cause why a mandamus should not issue to compel the performance by him or them of the particular duty.

The rule may include any number of persons, provided the duty is one to be performed by all of them (*l*); *e.g.* the justices of a county (*m*); the "inhabitants" of a parish (*n*); "the churchwardens, overseers and inhabitants" of a parish (*o*); "the churchwardens and overseers of the poor of the parish of X., and the principal inhabitants thereof" (*p*); "the bailiffs" of a town (*q*); "the keepers of the common seal" of a university (*r*). And it should call on them to shew cause why "a writ," not "one or more" writs, of mandamus should not issue (*s*).

Where the application is to compel some public officer to perform a duty, it is best to use his official title, and not the name of the individual (*t*).

[★ 368] ★ The order *nisi* should state with sufficient particularity the object of the writ (*u*).

It should state the day on which cause is to be shewn. The ordinary time was five days from its date (*x*); but a shorter time was given in cases of emergency (*y*). And the time might always be enlarged (*z*).

The order is drawn up by the master of the Crown Office.

An order *nisi* in the alternative for a mandamus or a *quo warranto* would be improper (*a*).

Notice is to be given by the order *nisi* to every person who, by the affidavits on which the order is moved, shall appear to be interested in or likely to be affected by the proceedings, and to any person who, in the

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(*l*) See for example R. *v.* Archdeacon of Middlesex, 3 A. & E. 615.

(*m*) See the cases against justices referred to *ante*, pp. 301 *et seq.*

(*n*) R. *v.* Wix, 2 B. & Ad. 199.

(*o*) R. *v.* St. Saviour's, 7 A. & E. 925.

(*p*) 2 B. & Ad. 199, note.

(*q*) R. *v.* Clitheroe, 6 Mod. 133.

(*r*) R. *v.* Cambridge, Burr. 1647.

(*s*) R. *v.* Bridgnorth, 10 A. & E. 70. See note (*c*).

(*t*) See R. *v.* Cambridge, Burr. 2011, where it was directed to be to "the late mayor" (without giving his name) of a borough.

(*u*) See R. *v.* Willis, 7 Mod. 261; R. *v.* Liverpool, 1 Barn. 82.

(*x*) See Archbishop of Canterbury *v.* Trinity College, Cambridge, 1 Barn. 194.

(*y*) See Anon., 2 Barn. 235, where the Court granted a rule for a mandamus unless cause were shewn next day.

(*z*) R. *v.* Cambridge, 8 Mod. 148. See now No. 297 of the New Crown Office Rules.

(*a*) See R. *v.* Winchester, 7 A. & E. 215, 219.

opinion of the Court or judge, ought to have such notice (*b*).

Every order is to be dated of the day of the week, month and year, on which the same was made, unless the Court or judge shall otherwise direct, and shall take effect accordingly (*c*).

Service of Order.—The order *nisi* must be served upon each person to whom notice is given by the order, as well as upon the party whom the order requires to shew cause (*b*).

Whenever service is not directed to be personal, service at the last known place of abode, or business, with a clerk, wife, or servant, or upon such other person, or in such other manner as the Court or a judge may direct, shall be deemed to be a sufficient service (*e*).

After service is effected, an affidavit of the fact should at once be made. An affidavit of service must state when, where, how and by whom such service was effected (*f*).

★ *Enlarging the order.*—The Court has al- [★ 369] ways, for sufficient cause shewn, enlarged the time for shewing cause against the order *nisi* (*g*).

An application for enlargement is by motion, of which two days' notice must be given, and is brought on as if it were an *ex parte* motion, and not put into the Crown paper (*h*). The hearing may be adjourned on such terms, if any, as the Court or judge thinks fit (*i*).

Amending order *nisi*.

The Court sometimes enlarges the time in order that the order *nisi* should be amended (*k*).

Shewing cause.

Any person, whether he has had notice or not, who can make it appear to the Court or judge that he is affected by the proceeding for a writ of mandamus, may shew cause against the order *nisi* or summons, and shall

(*b*) C. O. R., 61. See R. *v.* Maidenhall Savings Bank, 6 A. & E. 954; R. *v.* Tucker, 5 D. & R. 434; R. *v.* Bankes, Burr. 1453; R. *v.* Simpson, Burr. 1467; R. *v.* Commissioners of Treasury, 10 A. & E. 374.

(*c*) C. O. R. 4.

(*d*) Id. 62. As to service in case of a mandamus to Petty Sessions, see R. *v.* Tucker, 5 D. & R. 434.

(*e*) C. O. R. 139. (*f*) Id. 27.

(*g*) R. *v.* Simpson, Burr. 1467 (to give notice to an interested person); R. *v.* Bankes, Burr. 1453 (in order to add another name in the rule); R. *v.* Dolgelly Union, 8 A. & E. 563 (apparently to allow a particular piece of evidence to be brought before the Court); R. *v.* Cambridge, Burr. 2008 (enlarged by consent); R. *v.* East India Co., 4 M. & S. 279 (to allow time for an appeal to the Privy Council); R. *v.* Bateman, 4 B. & Ad. 554 (to give time for an affidavit of compliance with certain statutory requirements

(*h*) C. O. R. 255. (*i*) Id. 260.

(*k*) See R. *v.* Bankes, Burr. 1453.

be liable to costs in the discretion of the Court or a judge if the order should be made absolute, or the prosecutor obtain judgment (*l*).

But no person is allowed to shew cause against an order *nisi* unless he has previously obtained office copies of such order and of the affidavits upon which it was granted (*m*).

In the case of an application for a mandamus to proceed to an election of a corporate officer, the respondent on receiving the notice before mentioned (*ante*, p. 363), may shew cause in the first instance against the application (*n*).

Affidavits in opposition to order *nisi*.

All affidavits used before the order has been made absolute are properly entitled simply "In the High Court of Justice, Queen's Bench Division."

The affidavits filed in opposition to the motion should state all such facts and refer to all such documents as tend to disprove the applicant's title to a mandamus.

All the affidavits used must be filed in the Crown Office Department of the Central office (*o*).

[★ 370] ★ On every affidavit is to be indorsed a note shewing on whose behalf it is filed, and no affidavit is to be filed or used without such note, unless the Court or a judge shall otherwise direct (*o*).

In *R.* v. *Lords of the Treasury* (*p*), the Attorney-General, as representing the Crown, claimed a right to be heard in reply ; but the question of his right was left undecided.

Order *nisi* discharged.

Where the applicant fails to make out his title to the relief claimed, the order *nisi* will be discharged, with or without costs, in the discretion of the Court or judge.

The Court refused to allow an order *nisi* for a mandamus to be argued at the same time with one for a *quo warranto*, in respect of the same matter (*q*).

Order absolute.

If no cause is shewn, the order *nisi* is made absolute, on affidavit of service.

The Court will also make the order absolute where the applicant makes out a clear title to a mandamus.

It generally did so also where, the applicant having a *primâ facie* right, there were disputed questions of fact or doubtful points of law to be determined, which might be more satisfactorily dealt with on a return to the writ (*r*). But this reason for making absolute the

(*l*) C. O. R. 63. (*m*) Id. 26.
(*n*) 45 & 46 Vict. c. 50, s. 225. (*o*) C. O. R. 15.
(*p*) 16 Q. B. 360. (*q*) R. *v.* Winchester, 7 A. & E. 215.
(*r*) R. *v.* West Looe, 3 B. & C. 685 (*per* Bayley, J.). See also *per* Lord Denman, R. *v.* Birmingham, 7 A. & E. 259; *per* Lee, C. J., R. *v.* Bland, 7 Mod. 356; *per* curiam, R. *v.* Mayor of York, 4

order for a mandamus may, as observed by the present Master of the Rolls (*t*), become obsolete by reason of the Judicature Acts and Orders : Where the case was one of general interest and there was considerable doubt as to the law, the Court invariably allowed the mandamus to go and a return to be made, in order that the case might be taken to a Court of Error ; but now, as every order is appealable (*u*), there may be an appeal to the Court of Appeal and thence to the House of Lords upon the discretion of the Court in granting a mandamus; it being no longer necessary ★ that [★ 371] the facts should appear upon the record for the purpose of giving an appeal.

The Court on making the order absolute has sometimes ordered that the writ should not issue without an order from a judge for the purpose (*x*).

The order absolute is drawn up by the Master of the Crown Office.

Settling form of order absolute.

As the writ must follow the order absolute, the latter should be settled with care, and this may sometimes require the omission or modification of something contained in the order *nisi* (*y*).

Where the order absolute could not be drawn up, owing to the defendant's solicitor not filing the affidavits used by him in shewing cause, the Court peremptorily ordered him to produce them at the Crown Office the next day, in order that they might be filed (*z*).

Costs.

The costs of the order usually abide the ultimate event (*a*); but this is not invariably the case (*b*).

The costs are in the discretion of the Court or judge (*c*).

Security for costs.

Security for costs may be ordered to be given (*d*).

T. R. 700; R. *v.* Mayor, &c., of London, 5 B. & Ad. 237. *Per* curiam, R. *v.* Milverton, 3 A. & E. 286. See a concise statement of the rule on which the Court acts, *per* Coleridge, J., in R. *v.* Bishop's Stoke, 8 D. 611.

(*t*) R. *v.* Bishop Wearmouth, L. R. 5 Q. B. D. 73. See also the remarks of the same learned judge in R. *v.* Bangor, L. R. 18 Q. B. D. 360.

(*u*) See *per* Jessel, M.R., L. R. 5 Q. B. D., p. 69.

(*x*) See *Re* Bromley, 3 D. & R. 310.

(*y*) See R. *v.* Nottingnam Old Water Works Co., 6 A. & E. 371; R. *v.* Suffolk, 1 B. & A. 646.

(*z*) R. *v.* Middlesex, 1 Chitt. 368.

(*a*) R. *v.* Salop, 6 D. 34, 35; R. *v.* Fall, 1 Q. B. 636.

(*b*) See R. *v.* Commissioners of Thames and Isis, 8 A. & E. 905; R. *v.* East Anglian Railway Co., 2 E. & Bl. 475, where no cause was shewn against the rule, and it appeared that the litigation was substantially at an end.

(*c*) C. O. R. 300, Order LXV., r. 1.

(*d*) C. O. R. 300, Order LXV., r. 6.

The Court has refused to consider the poverty of an interested prosecutor a sufficient reason for ordering security for costs to be given, merely on an allegation that he was induced by others to apply for a mandamus (*e*).

The Court has sometimes allowed a mandamus to be prosecuted by persons other than the nominal prosecutors, on the latter being indemnified, to the satisfaction of the Court, against all costs (*f*). The amount of such indemnity may be subsequently increased by the Court (*g*).

Amending order absolute.

Any amendment which may be required in the order [★ 372] should be ★ applied for before the writ is issued. The Court has several times (*h*) refused to amend the order absolute after the writ had issued; though in one case (*i*) they allowed the prosecutor to make a second application for an order for a mandamus in the terms of the first mandamus.

Clerical mistakes or errors arising from any accidental slip or omission may at any time be corrected by the Court or a judge on motion or summons without appeal (*k*).

Amendment generally.—On the subject of amendment generally, see now Order XXVIII. of the Rules of the Supreme Court, 1883, which are, so far as applicable, to apply to all civil proceedings on the Crown side (*l*).

Service of order absolute.

The order absolute for a mandamus need not be served; but the cost of service of the order may be allowed, in the discretion of the taxing officer, where the writ is not issued (*m*).

Renewing motion for mandamus.

The general rule of practice is that the Court will not allow a party to succeed on a second application who has previously applied for the very same thing, without coming properly prepared (*n*); and this applies to public officers as well as to individuals (*o*). The only exception said to exist is where the alteration would be simply in the form of a title or jurat, and re-

(*e*) R. *v.* Malmesbury, 9 D. 359. Williams, J., mentioned a case in which the application for the writ was made *in formâ pauperis* (Id. 361).

(*f*) R. *v.* Southampton, 6 B. & S. 407. (*g*) Id.

(*h*) R. *v.* Water Eaton, 2 Smith, 54; R. *v.* Wiseman, 1 Barn. 405; R. *v.* East Lancashire Railway Co., 16 L. J. Q. B. 127.

(*i*) R. *v.* East Lancashire Railway Co., *ubi supra*.

(*k*) C. O. R. 299, Order XXVIII., r. 11.

(*l*) C. O. R. 299. See especially r. 12 of Order XXVIII.

(*m*) C. O. R. 64.

(*n*) *Per* Lord Denman, R. *v.* Manchester, &c., Railway Co., 8 A. & E. 427; R. *v.* Great Western Railway Co., 5 Q. B. 601.

(*o*) R. *v.* Pickles, 3 Q. B. 599.

swearing the affidavit would clearly leave parties in the same situation in which they were before (*p*).

Where a rule was discharged on the ground that there had been no demand and refusal, the Court refused to listen to a second application on fresh materials, shewing that a demand had since been made followed by a refusal (*q*).

But the general rule above mentioned has not been consistently acted upon.

Where a rule for a mandamus to a railway company, to pay the ★ amount of compensation as- [★ 373] sessed for lands taken by them, was discharged, because the affidavit of the applicant stated only that he was not in a situation to complete the title, he was allowed, on an amended affidavit, shewing that he had endeavoured to obtain a complete title, to renew his application; and the Court granted a rule absolute (*r*).

A renewed application has also been permitted where the party came with sufficient materials in the first instance, but by mistake of counsel or an officer of the Court, the rule had not been properly drawn up (*s*). And where the mandamus which issued was defective, a new mandamus was granted (*t*).

Where, on shewing cause against the rule for a mandamus, it was agreed that the matters in dispute should be tried on feigned issues at the assizes; after verdict for the prosecutor, he was allowed to renew his application; and the Court made absolute a rule for a mandamus (*u*).

In case of a renewed application the attention of the Court should be called to the fact that a former one had been refused (*x*).

The Court sometimes enlarged the rule in order to allow the applicant to make a further affidavit of necessary facts (*y*).

The order absolute, as well as the order *nisi*, may be appealed against to the Court of Appeal (*z*), and thence to the House of Lords. Appeal against order.

(*p*) R. *v.* Great Western Railway Co., *ubi supra*, disapproving Sherry *v.* Oke, 3 D. 349, 360.

(*q*) *Ex parte* Thompson, 6 Q. B. 721.

(*r*) R. *v.* Deptford Pier Co., 8 A. & E. 910. See also R. *v.* Nottingham, 1 W. Bl. 59, where, after a mandamus had been granted, the Court listened to an application for another mandamus.

(*s*) R. *v.* East Lancashire Railway Co., 16 L. J. Q. B. 127.

(*t*) London *v.* Swallow, 2 Keb. 76.

(*u*) R. *v.* West Riding, 12 East, 116.

(*x*) R. *v.* Pickles, 3 Q. B. 601.

(*y*) See R. *v.* Bateman, 4 B. & Ad. 554.

(*z*) See R. *v.* Bangor, L. R. 18 Q. B. D. 349, and the remarks of Lord Esher, M.R., at p. 360.

[★374] ★CHAPTER VIII.

THE WRIT.

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Form of writ.

After the order *nisi* has been made absolute, the next thing is for the prosecutor to prepare the writ, which must not go beyond the terms of the order. It is to be in the form set forth in the appendix to the New Crown Office Rules, with such variations as circumstances may require (*a*).

See Form in Appendix, *post*.

It must strictly conform to the terms of the order absolute. If it goes beyond them in any material respect, it is liable to be quashed or superseded (*b*).

It is directed to the persons mentioned in the order absolute, *i.e.*, to all those on whom the duty lies of executing the writ (*vide ante*, p. 364). In a case of difficulty the Court has sometimes pointed out the persons to whom it should be directed (*c*).

The first word "Whereas" should be followed by a short statement of the facts (without the evidence to prove them) which constitute the prosecutor's right to [★375] have the particular duty performed ★by the defendant or defendants. The writ should then allege a demand to have the duty performed, and a neglect and refusal by the defendant or defendants to perform it. A command follows to do the act or acts specified, or to

(*a*) C. O. R. 68.

(*b*) R. *v.* Water Eaton, 2 Smith, 54; R. *v.* Wildman, Str. 879; R. *v.* Kingston-upon-Hull, 8 Mod. 209, 11 Mod. 382; R. *v.* Birmingham, 11 A. & E. 27, n.

(*c*) See *per* Lord Ellenborough, R. *v.* Commissioners of Requests, 7 East, 295; R. *v.* Cambridge, Burr. 1659, 1660; id. Burr. 2011; Prin's case, 1 Keb. 686.

shew cause to the contrary thereof, and to make known to the Sovereign at her Royal Courts of Justice how the writ has been executed, forthwith then returning the said writ.

Direction.

Great strictness has been required in naming the body, person or persons to whom the writ is directed.

Writs addressed to corporations have been held bad for inaccurately giving the title of the corporation (*d*). Such writs should be addressed to the corporation as a whole by its proper corporate title, or, in case the duty is one to be performed by part only of the corporate body, either to such part or to the entire corporate body (*e*).

It seems that a corporation by prescription might have several names by reputation, any one of which might be sufficient (*f*).

Care should be taken not to include any persons whose concurrence to the act to be done is not necessary (*g*).

When several duties are to be performed by distinct parts of the body corporate, a writ commanding the performance of all by the entire body will be construed *reddendo singula singulis* (*h*).

The observations already made, when dealing with the question of parties to the order, apply also to the manner in which the writ ★ should be di- [★376] rected to justices (*i*); and to officers by their official appellation (*k*).

A misdirection of the writ may be taken advantage of in the return (*l*). On the other hand, the misdirec-

(*d*) *E.g.*, a writ addressed to the "alderman and commonalty" of a borough, the proper title of the corporation being "the mayor and commonalty," though the office of mayor was at the time vacant, R. *v.* Smith, 2 M. & S. 598; one addressed to "the mayor, aldermen, and commonalty," whereas the corporate title was "mayor, burgesses and commonalty," R. *v.* Rippon, 2 Salk. 433; one addressed to the "mayor, &c., of the city of Lincoln, in the county of Lincoln," instead of "in the county of the city of Lincoln," R. *v.* Lincoln, 12 Mod. 190; and one addressed "ballivis, &c., Gippi," instead of "Gipwic" (Ipswich), 2 Salk. 434. See also R. *v.* Norwich, 1 Str. 55; Holt's case, Sir T. Jones, 51, denied to be law in case of Abingdon, Carth. 501, 2 Salk. 699; Witherington's case, 1 Keb. 61, 68; R. *v.* Taylor, 3 Salk. 231; R. *v.* Plymouth, 1 Barn. 81. Cf. R. *v.* Leeds, 1 Str. 640.

(*e*) See R. *v.* Abingdon, 2 Salk. 699. *Per* Powell, J., R. *v.* Gloucester, Holt, 451.

(*f*) Whitacre's case, 11 Mod. 67.

(*g*) See *per* Lord Ellenborough, R. *v.* Smith, 2 M. & S. 598.

(*h*) R. *v.* Tregony, 8 Mod. 111, 127.

(*i*) Vide *ante*, pp. 365, 367.

(*k*) See for example *per* Lord Mansfield, R. *v.* Cambridge, 1 W. Bl. 353.

(*l*) Witherington's case, 1 Keb. 68; R. *v.* Ipswich, 2 Salk. 434.

tion may be waived, by a return made in the right name (*m*).

See now the large powers of amendment referred to *ante*, p. 372.

If the facts stated do not shew a title on the part of the prosecutor, the writ is liable to be quashed or superseded (*n*); but the right may be stated generally, and no precise form is necessary (*o*).

Body of writ.

The facts which shew that the duty sought to be enforced rests upon the defendant should also be stated (*p*).

A custom, where the right depends on it, should be fully stated (*q*).

Where the consent of a particular person to an appointment is necessary, the giving of such consent must be alleged (*r*). So should the lapse of a reasonable time for the performance of the duty sought to be enforced (*s*).

The demand for the performance of the duty should be expressly alleged (*t*), as well as the neglect and refusal to perform it.

It has been said by more than one judge (*u*) that the writ ought to state distinctly that the prosecutor has no other remedy, and that, if it does not, the defendants are deprived of the power of traversing that most material fact; but many precedents shew that no express allegation of the absence of other remedy is necessary. It must however appear from the facts stated or the nature of the case, that no other remedy does exist (*x*).

The command.

[★377] ★ The mandatory clause must correctly state the duty to be performed, and not in wider terms than the law justifies (*y*). A defect in this respect is

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(*m*) See *per* Keeling, J., R. *v.* Mills, 1 Keb. 623; *per* Lord Kenyon, R. *v.* York, 5 T. R. 74. R. *v.* Ipswich, *ubi supra*.

(*n*) R. *v.* West Riding, 7 T. R. 50, 53.

(*o*) *Per* Lee, C.J., R. *v.* Nottingham, Say. 37.

(*p*) See *per* Lord Ellenborough, in R. *v.* Bishop of Oxford, 7 East, 352.

(*q*) See Needham's case, Trem. 469, cited 7 East, 350.

(*r*) R. *v.* Bishop of Oxford, 7 East, 352.

(*s*) R. *v.* Eastern Counties Railway Co., 10 A. & E. 568, 569.

(*t*) See R. *v.* Ward, 1 Barn. 411.

(*u*) See *per* Abbott, C.J., R. *v.* Margate Pier Co., 3 B. & A. 224. See also *per* Holt, C.J., in R. *v.* Shepton, Mallett, 5 Mod. 421.

(*x*) See R. *v.* Margate Pier Co., *ubi supra*, an application for a mandamus to compel payment of a rate, where there was an absence of averment that the defendants had no effects on which a distress could be levied; R. *v.* Hopkins, 1 Q. B. 169, where, on the facts stated, trover or detinue would have lain.

(*y*) See R. *v.* St. Pancras, 3 A. & E. 535; S. *v.* S., 6 A. & E. 326–328.

not cured by a properly limited requisition in the recital (*z*).

The duty may consist of several acts, *e.g.*, to enter continuances, and hear an appeal (*a*). And where the object to be obtained requires the doing of several acts by different persons, the same writ may command the doing of all; *e.g*, to a lord to hold a court baron, and to certain of the suitors to compose a homage and present certain conveyances (*b*). But several rights cannot be joined in the same writ (*c*).

In the case of a ministerial act, the command is specific, *e.g.*, to admit, swear in, or restore A. B. to a particular office; in the case of a judicial act, it is general, *e g.*, to hear and determine, without prescribing what decision is to be given.

A command to directors of a dock company, "to make such alterations and amendments in the sewers as were necessary in consequence of the floating of the harbour," was held sufficiently definite without mention of any specific alteration; the mode of remedying the evil being left to the discretion of the Dock Company by their Act of Parliament (*d*).

Where the writ commanded the defendants to take measures for obtaining and recovering certain dock dues, and to pay over a certain portion of them to the prosecutors, it was objected that the writ should have pointed out with particularity what measures the defendants were to take, and that the prosecutors could not ask the defendants to take legal proceedings without an offer of indemnity. The House of Lords, as advised by the majority of the judges, held that the writ was sufficient; that it was not necessary in the ★ first instance to make an offer of indem- [★ 378] nity, or to point out what proceedings should be taken; that the writ of mandamus necessarily assumed a general form, leaving it to those who were called on to make a return to state in their return such difficulties, if any, as existed in the way of what was required to be done (*e*).

(*z*) R. *v.* St. Pancras, 6 A. & E. 326, *seq.*

(*a*) Vide *ante*, p. 301.

(*b*) R. *v.* Montacute, 1 W. Bl. 60, 1 Wils. 283. Cf. R. *v.* Willis, 7 Mod. 261.

(*c*) See R. *v.* Chester, 5 Mod. 10; Anon., 2 Salk. 436; case of Andover, 2 Salk. 433; *Ex parte* Scott, 8 Dowl. 328. See R. *v.* Twitty, 2 Salk. 434, where the same writ commanded the admission of two persons as churchwardens.

(*d*) R. *v.* Bristol Dock Co., 6 B. & C. 181.

(*e*) R. *v.* Southampton, L. R. 4 E. & Ir. App. 449, 475.

When the writ commands the defendant "forthwith" to perform the duty named, the Court does not thereby mean that everything must be done instantly, but that the defendant must set about the matter directly and do what he can (*f*).

Date and teste.

Every writ of mandamus shall bear date on the day when it is issued (*g*), and shall be tested at the Royal Courts of Justice, London, in the name of the Lord Chief Justice of England (*h*).

The writ may be made returnable forthwith, or time may be allowed to return it, either with or without terms, as the Court thinks fit (*i*).

Indorsement.

The writ is to be endorsed as follows:

"By order of Court" [or of Mr. Justice]
At the instance of
This writ was issued by, &c.
[The solicitors for the prosecutor, or the prosecutor in person].

Issue of writ.

The writ is issued at the Crown Office Department of the Central Office (*k*).

Every writ shall be prepared by the solicitor or party suing out the same, and shall be written or printed on parchment (*l*).

Every writ shall, before being sealed, be endorsed with the name and address of such solicitor or party; and, if sued out by the solicitor as agent, with the name and address of the principal solicitor also (*m*).

[★ 379] ★ All writs issued at the Crown Office are to be entered in a book to be there kept for the purpose (*n*).

Where returnable.

The writ is made returnable in the Queen's Bench Division of the High Court, or in vacation may be made returnable before a judge at Chambers (*o*).

Amending writ.

Even before the large powers of amendment given by the Common Law Procedure Acts and the Judicature Acts, the Court sometimes allowed the writ to be amended, and occasionally during argument on the validity of the return (*p*).

(*f*) *Per* Patteson, J., R. *v.* Ouze Commissioners, 3 A. & E. 550.

(*g*) The former practice was that the writ bore date the same day as the rule absolute.

(*h*) C. O. R. 68, 231.

(*i*) Id. The former rule required that there should be eight days at least between the teste and return where the Act was required to be done in London or within forty miles of it, and fourteen days in all other cases. But the Court sometimes shortened the time.

(*k*) C. O. R. 229. (*l*) Id. 230. (*m*) Id.

(*n*) C. O. R. 230. (*o*) Id. 232.

(*p*) R. *v.* Newbury, 1 Q. B. 759. See R. *v.* Stafford, 4 T. R.

By rule 12 of Order XXVIII. (the whole of which, so far as applicable, is to apply to all civil proceedings on the Crown side (*q*)), the Court or a judge may, at any time, and on such terms as to costs or otherwise as the Court or judge may think just, amend any defect or error in any proceedings; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings.

Cross or concurrent writ.

The Court has sometimes granted a cross or concurrent writ, where there was reasonable ground for thinking that the person or persons who had obtained the first writ did not *bonâ fide* intend to prosecute it (*r*). But mere delay in executing the the former writ has not been considered a sufficient reason for granting another (*s*).

The procedure to obtain it is the same as that already described.

Alias or pluries writ.

An alias writ was sometimes granted where the first writ had been superseded for some technical defect (*t*); or where a better returned was required (*u*); and when necessary a pluries writ was also granted (*v*).

Any person by law compellable to make any return to a writ of mandamus must make his return to the first writ (*x*).

Service of writ.

★ If the writ of mandamus is directed to [★ 380] one person only, the original must be personally served upon such person; but if the writ be directed to more than one, the original is to be shewn to each one at the time of service, and a copy served on all but one and the original delivered to such one (*y*).

When a writ of mandamus is directed to companies, corporations, justices or public bodies, service shall be made upon such and so many persons as are competent to do the act required to be done, the original being de-

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689; R. *v.* Clitheroe, 6 Mod. 133, note; R. *v.* Lyme Regis, 1 Doug. 135 note (*f*); R. *v.* Conyers, 15 L. J. Q. B. 300.

(*q*) C. O. R. 299.

(*r*) See *per* Lord Mansfield, R. *v.* Wigan, 2 Burr. 784; R. *v.* Halsemere, Say. 106; R. *v.* Plymouth, 1 Barn. 130.

(*s*) R. *v.* Scarborough, Say. 105.

(*t*) See R. *v.* St. Andrew's, Holborn, 7 A. & E. 281.

(*u*) See R. *v.* Corye, Sty. 87, the case of a writ of restitution to restore the recorder of Norwich.

(*v*) See R. *v.* Owen, Skin. 669; cf. Coventry case, 2 Salk. 429; Anon., Palm. 455.

(*x*) C. O. R. 69. See the similar provision of 9 Ann. c. 23, as to municipal offices, made applicable to all writs of mandamus by 1 Wm. 4, c. 21, s. 3.

(*y*) C. O. R. 65.

livered to one of such persons; except where by statute service on the clerk or some other officer is made sufficient service (*z*).

Writ may be peremptory in the first instance.

The writ is usually first granted in the alternative form above set forth, *i. e.*, commanding the person to whom it is directed to do the act or acts specified; or to shew cause to the contrary thereof, which is done by the return.

The Court or a judge may, however, if they or he shall think fit, order that any writ of mandamus shall be peremptory in the first instance (*a*).

This, in former times, was only done in cases where, upon the argument of the order *nisi*, the facts were placed beyond dispute and the law was clear. Where there was any doubt as to either, the alternative writ only was issued, and the respondent was allowed to make a return. "That course was taken because in olden days no writ of error would lie from a mandamus, the granting of it being purely discretionary; and the Court therefore gave the defendant an opportunity of appearing and arguing, on the return, the question whether the mandamus ought to have been granted. But the reasons for declining to issue a peremptory mandamus, where the Court has doubt and hesitation, have now gone; because any order for a mandamus may now be instantly appealed against" (*b*).

Where there is no real dispute about the facts, the proper course now, in the opinion of Lord Esher, M.R. (*c*), is not to inflict a prolongation of litigation [★ 381] upon the parties by issuing a mandamus ★ to which a return must be made, but to make the writ peremptory in the first instance.

Filing writ.

The writ when returned must be filed at the Crown Office, along with the return. If returnable before a judge it is to be so filed after his decision thereon, with the return and any order made thereon, or a copy of such order (*d*).

Superseding writ.

Writs have been superseded, on motion, for various reason:—as being complicated and not agreeing with the order absolute, *e.g.*, where the order absolute being to a mayor to assemble and do the work of a corporation, the writ was for an assembly and to admit all persons having a right to their freedom who should appear

(*z*) Id. 66. See R. *v.* Birmingham, &c., Railway Co., 1 E. & B. 293.
(*a*) C. O. R. 67.
(*b*) *Per* Lord Esher, M.R., R. *v.* Bangor, L. R. 18 Q. B. D. 360.
(*c*) Ib. (*d*) C. O. R. 233.

and demand it (*e*); as being misdirected (*f*); on the ground that the matter was being litigated before another competent tribunal (*g*); because there was not the proper interval between the teste and the return (*h*).

But the Court will supersede a writ only where there is some manifest fault in it (*i*); and not on any ground which is properly the subject matter of a return (*k*).

The application must be by way of motion (supported by affidavits) to a Divisional Court for an order *nisi* (*l*).

Notice of motion.—Unless the Court or a judge give special leave to the contrary, there must be at least two clear days between the service of a notice of motion and the day named in the notice for hearing it (*m*). A copy of the affidavit intended to be used must be served with the notice of motion (*n*).

Quashing the writ.

The Court has on various grounds quashed the writ, on motion: *e.g.*, on the ground of its being misdirected (*o*); as varying in some material respect from the order absolute (*p*); as not shewing a title ★ to [★ 382] the relief claimed (*q*); or not shewing by the facts alleged that there was no other remedy (*r*); or shewing on the face of it the existence of a visitor who had jurisdiction over the matter (*s*); or where it commands the doing of what cannot be done legally (*t*), or the performance of a statutory duty in terms wider than those of the statute (*u*); or where it directs one person to command another to do something (*x*). So where the mandamus to admit to a copyhold tenement was ad-

(*c*) R. *v.* Kingston-upon-Hull, 1 Str. 578; R. *v.* Wildman, 2 Str. 879.

(*f*) See R. *v.* Norwich, 1 Str. 55, where ultimately no supersedeas went, as it was agreed to try the matter in a feigned issue.

(*g*) Gray *v.* Tench, Comb. 454; cf. R. *v.* Bettesworth, 7 Mod. 219.

(*h*) R. *v.* St. Andrew's, Holborn, 7 A. & E. 281, where the Court had granted a rule absolute in the first instance. See R. *v.* Dover, 1 Str. 407.

(*i*) R. *v.* Ipswich, 1 Barn. 407; R. *v.* Beecher, 8 Mod. 335.

(*k*) Anon., 1 Barn. 362; R. *v.* Whaley, 7 Mod. 308.

(*l*) C. O. R. 253, 254. (*m*) Id. 250. (*n*) Id. 256.

(*o*) Anon., 2 Salk. 525; R. *v.* Hereford, 2 Salk. 701.

(*p*) R. *v.* Water Eaton, 2 Smith, 54; R. *v.* Birmingham, 11 A. & E. 27, 28, note.

(*q*) R. *v.* Hopkins, 1 Q. B. 161; R. *v.* West Riding, 7 T. R. 48; R. *v.* College of Physicians, 5 Burr. 2740; R. *v.* St. Pancras, 3 A. & E. 535; R. *v.* Powell, 1 Q. B. 352.

(*r*) R. *v.* Margate Pier, 3 B. & A. 220.

(*s*) Walker's case, Cas. t. Hard. 218. In such a case the writ is said by Lord Hardwicke to be *felo de se*.

(*t*) Tawny's case, 2 Salk. 531; R. *v.* Littleport, 6 Mod. 97; R. *v.* Nottingham, 2 Barn. 56; R. *v.* St. Pancras, 3 A. & E. 535.

(*u*) R. *v.* St. Pancras, 6 A. & E. 314.

(*x*) R. *v.* Derby, 2 Salk. 436.

dressed to the steward only, omitting the lord (*y*); also where one writ was to admit or restore several persons to their offices (*z*), unless the several persons formed but one officer (*a*).

"It is contended," said Lord Denman in one case (*b*), "that the requisition of the writ may be partly good and partly bad, and that the valid part may be enforced . . . We must enforce it in the terms in which it was issued, or not at all."

It was held that if, on the face of the mandamus, there was no ground for the writ, the defect could not be supplied by matter appearing in the return (*c*).

The Court has refused to quash a mandamas on grounds which might have been shewn against making the order absolute; *e.g.*, that a suggestion on which the motion was made was untrue (*d*).

There is an important distinction between the defective statement of a valid claim, and the statement of a defective claim. The former may be cured by a verdict which necessarily involves proof of the facts defectively stated (*e*).

Where the writ commanded the master of a corporation to put the corporate seal to a particular instrument, an [★ 383] objection to the ★ writ, that it did not sufficiently shew the defendant's control over the seal, was held too late after a return admitting that he had refused to affix the seal and claimed the right to withhold it (*f*).

But, as a general rule, the objection to the writ may be taken at any time; as the Court will, before a peremptory mandamus issues, suffer itself to be informed and examine whether the writ is so framed as to give them jurisdiction (*g*).

As to the motion and notice of it, vide *ante*, p. 381 (*h*).

(*y*) R. *v.* Powell, 1 Q. B. 365.

(*z*) R. *v.* Chester, 3 Salk. 230; 5 Mod. 10; Anon., 2 Salk. 436; cf. R. *v.* Kingston-upon-Hull, 1 Str. 578; and case of Andover, 2 Salk. 433.

(*a*) See R. *v.* Ipswich, 1 Barn. 407.

(*b*) R. *v.* St. Pancras, 3 A. & E. 542.

(*c*) R. *v.* Hopkins, 1 Q. B. 161.

(*d*) R. *v.* Stamford, 6 Q. B. 433.

(*e*) See Delamere *v.* Reg., L. R. 2 E. & I. App. 419.

(*f*) R. *v.* Kendall, 1 Q. B. 384.

(*g*) *Per* Abbott, C.J., R. *v.* Margate Pier Co., 3 B. & A. 224. See R. *v.* Willingford, 2 Barn. 132; R. *v.* Ledgard, 1 Q. B. 624 (disapproving R. *v.* York, 5 T. R. 66); R. *v.* Bristol Dock Co., 6 B. & C. 181, 190; *per* Lord Chelmsford, C., Delamere *v.* Reg., L. R. 2 E. & I. App. 426.

(*h*) The Court always required notice to be given. See *Anon.*, 1 Wils. 30.

★ CHAPTER IX. [★ 384]

THE RETURN.

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Return to first writ.

ANY person by law compellable to make any return to a writ of mandamus shall make his return to the first writ (*a*).

Various kinds of return.

The return of the writ may be (A), that the thing commanded has been done, or (B), to the effect that the mandatory part should not be enforced, either (1) because certain material facts alleged in the writ are denied, this being called traversing the suggestion or supposal of the writ; or (2), because certain additional facts are affirmed, this being likened to a plea in confession and avoidance; or (3), because the writ on the face of it shews no legal right to have the alleged duty performed; this last being in the nature of a demurrer to the writ (*b*).

(*a*) C. O. R. 69.

(*b*) "It's an uncontroverted maxim that every subject ought to return the writ [executed] or excuse it."—*Per* Keeling, C. J., 2 Keb. 168. "It is the duty of the person to whom a mandamus is directed to obey the writ, or to return a cause for not obeying

Obedience

[★ 385] ★ When the return is of obedience (*c*) to the writ, the words of the mandatory part of the writ should be recapitulated in the past, instead of the future, tense, adding, "as by the said writ we are commanded" (*d*).

Even where the thing has been done before the writ issued, this fact must be returned (*e*).

Where it is intended to obey the writ, but the mandate cannot be completely executed by the day fixed for the return, the return should state what has been done by way of compliance, and that the defendants are proceeding with the rest (*f*).

Where a statute imposed on commissioners the duty of executing all such works, &c., "as should from time to time be deemed necessary, proper, or expedient for putting certain banks and bridges in a permanent state of stability and security," and a mandamus was granted ordering them to proceed "to put the banks of the river in a permanent state of stability and security, and to construct the forelands and slopes of the said banks as far as practicable, upon one uniform system," &c., a return that the defendants had from time to time and at all times from the passing of the Act, proceeded to execute all such works "as should be or were from time time deemed necessary, proper, or expedient for putting the banks in a permanent state of stability and security, and for constructing the forelands and slopes of the banks, as far as practicable upon one uniform system," was held a bad return. If the return had stated that [★ 386] the commissioners thought such and ★ such things necessary, and that they had done them, that would have been sufficient; it did not state that they

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it," &c.—*Per* Ryder, C. J., R. *v.* Stirling, Say. 175. See R. *v.* St. John's College, Skin. 359.

(*c*) In R. *v.* Justices of Pirehill North (L. R. 14 Q. B. D. 13) it was argued that a return of obedience to the alternative writ was not a "return" properly so called within the stat. 9 Ann. c. 20, s. 2, but merely a certificate of compliance. To which Lindley, L.J., replied: "I can see nothing in the Act or books of practice to justify any such distinction. We are not dealing here with a return of compliance with a peremptory mandamus, and I cannot find any authority for saying that a return of compliance is not a return of compliance within the meaning of the statute of Anne."

(*d*) See form in Appendix.

(*e*) Anon., 1 Barn. 362; cf. R. *v.* Tendring, &c., Commissioners of Sewers, Lord Ray. 1479. Where the respondent obeyed the writ and made no return, the Court made absolute a rule against him to pay the costs of the mandamus and of the application. R. *v.* Milverton, 3 A. & E. 286, note (*d*).

(*f*) See R. *v.* Ouze Bank Commissioners, 3 A. & E. 549, 550.

had done all they could; and it was consistent with it that they had done nothing at all (*g*).

Where the writ commanded the steward of a court leet to hold a Court, impanel and swear a jury, and charge them them to elect and swear some person into the office of portreeve, a return that the steward had holden a court leet and impanelled and sworn a jury, and had charged them to elect and swear some person into the office of portreeve, and that the jury found that a person had already been duly elected and sworn into the office, and therefore no person could be elected and sworn into the office as commanded by the writ, was held sufficient; the steward having obeyed the writ so far as it was in his power by his own acts to do so (*h*).

A return to a mandamus to quarter sessions, to give judgment against certain persons convicted, alleging that the sessions had given judgment, and setting forth the judgment given, is sufficient, though the judgment be erroneous (*i*).

To a mandamus to hear and determine a complaint, a return by justices that they have heard and determined has been held sufficient (*k*). But where it is desired to make such a return to the first writ, the proper course is to state what the justices have in fact done, and so leave it to the Court to say whether what they have done is or is not a hearing and determination (*l*).

Obedience to part of writ.

The return may be of obedience to a part of the mandatory clause, and of new facts which furnish an answer to the rest of it (*m*).

Denial of material facts alleged.

Every material allegation of the writ which is not denied in the return is to be taken as admitted (*n*).

Any material allegation intended to be traversed should be expressly denied, and not in a doubtful or circuitous manner (*o*), ★ or argumentative- [★ 387] ly (*p*). The return must answer, not the words but

(*g*) Ib. (*h*) R. *v.* Williams, Say. 140.

(*i*) R. *v.* West Riding, 7 T. R. 467.

(*k*) R. *v.* Richardson, 1 Wils. 21; R. *v.* Mainwaring, E. B. & E. 474, 27 L. J. M. C. 278.

(*l*) See *per* Brett, M.R., R. *v.* Pirehill North, L. R. 14 Q. B. D. 18.

(*m*) See R. *v.* Staffordshire, 6 A. & E. 84.

(*n*) See R. *v.* Ipswich, 2 Salk. 434; R. *v.* Malden, 2 Salk. 431. See *per* Bayley, J., R. *v.* Ilchester, 4 D. & R. 330.

(*o*) See the judgment in R. *v.* Kendall, 1 Q. B. 383, 384; R. *v.* Abingdon, 2 Salk. 432.

(*p*) R. *v.* Stephens, Sir T. Jones, 177; R. *v.* Brewers' Co., 4 D. & R. 492.

the materialty of the writ; a return which seems to be guarded and not to deny the substance is bad (*q*).

A return to a mandamus to admit a person as duly elected, which set forth facts and documents shewing that there was no right in the electors, was held sufficient; though it did not in direct terms deny the right, as it ought to have done (*r*). But a return to a mandamus to admit the heir to a copyhold tenement, which did not deny that he was heir, except argumentatively, was held bad (*s*).

To a writ commanding a surveyor of highways to deliver up books which the writ suggested were now in his possession, and which he had refused to deliver up though demanded from him, a return that the defendant had not on the day of the teste of the mandamus, nor since, nor now, nor when they were demanded from him, any books in his possession, was held good; though it did not state whether he had them in his possession between the times of the demand made and the issuing of the writ, nor what he had done with them (*t*).

Where the writ is to swear in one duly elected, a return that he was not duly elected is good (*u*); though it has been said that the return would have been better without the word "duly" (*x*). The addition of the reason why he was not duly elected makes no difference (*y*).

[★ 388] ★ A return that on a *quo warranto* information there had been judgment of ouster against the prosecutor, and that he had never since been elected, was also held good (*z*).

A return that the prosecutor was not duly elected,

(*q*) *Per* Lord Mansfield, R. *v.* Lyme Regis, 1 Doug. 85.

(*r*) R. *v.* Kendall, 1 Q. B. 366, 382. "We are not prepared to say that a return is necessarily bad by reason of this defect, if such facts should be set forth as fully to convince the Court, in point of law, that the right does not exist as claimed" (*per* Lord Denman, C.J., p. 382). Cf. R. *v.* Hearle, 1 Str. 625.

(*s*) R. *v.* Brewers' Co., 4 D. & R. 492.

(*t*) R. *v.* Round, 4 A. & E. 139; but the Court refused the defendant his costs.

(*u*) See R. *v.* Williams, 8 B. & C. 681; *per* Lord Denman, R. *v.* St. Andrew's, 10 A. & E. 739; R. *v.* Twitty, 2 Salk. 434, referred to R. *v.* Ward, 2 Str. 894; R. *v.* Hill, 1 Show. 253; R. *v.* Kelk. 12 A. & E. 559; Crawford *v.* Powell, Burr. 1013. Also R. *v.* Ward, 2 Keb. 284; R. *v.* Hereford, 1 Keb. 660.

(*x*) Lambert's case, Carth. 170. R. *v.* Chester, 5 Mod. 11; R. *v.* Hereford, 1 Keb. 716; Cf. Manaton's case, Sir T. Ray. 365.

(*y*) R. *v.* Aldborough, 10 Mod. 102, *per* Powell, J. See a return of "no such office in that corporation," R. *v.* Dartmouth, 3 Salk. 229.

(*z*) R. *v.* Hearle, 1 Str. 625.

admitted, *and* sworn in, was held bad; where a similar return, with the word "or" substituted for "and," would have been good (*a*).

To a writ to restore a person elected and admitted as coroner, a return that though duly elected, neither at the time of his said election, nor since that time, nor is he yet admitted or sworn into the office, was held good, as a sufficient denial of a material allegation of the writ (*b*).

To a mandamus to insert the prosecutor's name on the burgess list, a return that he was not duly qualified was held sufficient (*c*).

One part of the return may not deny a fact which another part has admitted (*d*).

The traverses in the return should be of matters of fact, not of law (*e*).

The traverse need not be in terms more precise than those in which the title is asserted in the writ (*f*).

Alleging new facts.

If new facts are alleged they must be alleged with certainty (*g*), and not inferentially or argumentatively (*h*).

To constitute a good return they must completely answer the mandatory part of the writ. Thus, where the writ commanded the defendants to maintain and repair certain parts of the south bank of a channel, a return that as near as circumstances would admit they had maintained the new course of equal depth and breadth at the bottom, and with equal inclination of the sides, was held bad, as not answering the mandatory part of the writ, but ★ only dealing with [★ 389] matter stated in the writ as a consequence of the omission to repair (*i*).

The return may set forth any number of causes for not obeying the command of the writ, provided they are not inconsistent with each other; the sufficiency of

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(*a*) R. *v.* Lyme Regis, 1 Doug. 85. The allegation in the above return is an instance of a negative pregnant. See also R. *v.* York, 5 T. R. 75 (*per* Buller, J.); R. *v.* Maidstone, 1 Keb. 733.

(*b*) R. *v.* King's Lynn, Andr. 105.

(*c*) R. *v.* New Windsor, 7 Q. B. 908.

(*d*) R. *v.* Bettesworth, 1 Barn. 299.

(*e*) See R. *v.* Bristol Dock Co., 2 Q. B. 64; R. *v.* Nottingham, Say. 37.

(*f*) R. *v.* Dover, 11 Q. B. 260, 278.

(*g*) See R. *v.* Abingdon, 2 Salk. 432; R. *v.* Chester, 5 Mod. 10.

(*h*) R. *v.* Stirling, Say. 174; *per* Holroyd, J., R. *v.* Hughes, 4 B. & C. 379; R. *v.* Hereford, 6 Mod. 309; R. *v.* Stephens, Sir T. Jones, 177; R. *v.* Raines, 3 Salk. 233; *per* Lord Mansfield, R. *v.* Lyme Regis, 1 Doug. 181. See R. *v.* Evans, 1 Show. 282.

(*i*) R. *v.* Bristol Dock Co., 2 Q. B. 64.

any one being enough to stop the issue of a peremptory writ (*k*); *e.g.*, (1) a denial of the borrowing, and (2) the bankruptcy of the prosecutor, where the mandamus was for the payment of money (*l*); that a certain person was not a burgess, (2) that he was not eligible to the office of councilman, and (3) that he was not elected (*m*): that a particular person was not duly elected, and (2) that a tribunal authorized to decide upon the election had adjudged it to be void (*n*): that S. was elected alderman by a majority of votes and returned as so elected to the court of mayor and aldermen, (2) that a petition having been presented against him the court of mayor and aldermen, having examined into the matter, determined that he was not a fit person to be elected and was not duly elected, and (3) that he was not in fact duly elected (*o*): that the applicant was not duly elected, and (2) that there was a custom for the inhabitants to elect and remove at pleasure, and that the applicant was removed pursuant to the custom (*p*).

Where the writ commanded restoration to an office, a return that neither at the time of his election, nor since, has the prosecutor been admitted, nor is he yet admitted, was held good (*q*).

Though several causes of amotion may be returned they must not contradict one another (*r*).

A return of outlawry of the applicant is good (*s*).

[★ 390] ★To a mandamus to appoint overseers for a particular place, under 13 & 14 Car. 2, c. 12, it was held a good return that the place was not a village or township (*t*).

A return shewing the existence of a visitor by whom the matter is cognizable will be sufficient (*u*).

(*k*) See *per* Lord Kenyon, R. *v.* Archbishop of York, 6 T. R. 439; *per* Parke, J., R. *v.* London, 3 B. & Ad. 271; R. *v.* Old Hall, 10 A. & E. 248; R. *v.* New Windsor, 7 Q. B. 917; Wright *v.* Fawcett, 4 Burr. 2041; R. *v.* Cambridge, 2 T. R. 461, 462; R. v. Taunton, St. James, 1 Cowp. 413.

(*l*) R. *v.* Brancaster, 7 A. & E. 458.

(*m*) R. *v.* Cambridge, 2 T. R. 456.

(*n*) *Per* Lord Tenderden, R. *v.* London, 9 B. & C. 26.

(*o*) R. *v.* London, 5 B. & Ad. 233, 2 N. & M. 126.

(*p*) R. *v.* Taunton, St. James, 1 Cowp. 413.

(*q*) R. *v.* King's Lynn, Andr. 105, 106, distinguishing R. *v.* Abingdon, 2 Salk. 432.

(*r*) R. *v.* Pomfret, 10 Mod. 108. See also Wright *v.* Fawcett, Burr. 2041; cf. R. *v.* London, 9 B. & C. 1.

(*s*) R. *v.* Bristol, 1 Show. 288.

(*t*) R. *v.* Welbeck, 2 Str. 1143.

(*u*) See R. *v.* Whaley, 2 Str. 1139; Parkinson's case, 3 Mod. 265; 1 Show. 74; R. *v.* St. John's College, Comb. 238; R. *v.* Ely, 1 Wils. 209, 266.

If the office is one held at will, the return should state a determination of the office by the will of the competent authority (*x*).

The return may be of new facts to part of the mandatory clause and of obedience to the rest of it (*y*).

A matter or inference of law need not be alleged; *e.g.*, the power of amotion by a corporation (*z*).

Sufficiency of return.

In order to be good the return must shew a sufficient reason for not obeying the mandatory clause of the alternative writ. The Court will not presume for or against its sufficiency (*a*).

Any one sufficient reason will be enough to sustain the return, though the return should allege other insufficient reasons (*b*).

Impossibility of obedience is a sufficient return: *e.g.*, that the defendant has not got possession of books which he is commanded to deliver up (*c*); that the commission of the defendants as Commissioners of Sewers expired in four days after the delivery of the writ, and therefore there was not time to make the rate commanded (*d*); that a railway company's compulsory powers had expired before the mandamus was applied for or issued, and the company could not acquire the land by voluntary conveyance (*e*); or that without any default on their part they never have been and are not in a situation lawfully to exercise those ★powers (*f*). But a return that the capi- [★ 391] tal for the undertaking had not been subscribed, without shewing that the company had tried and failed and was unable to have it subscribed, was held bad (*g*). And a bare return of want of funds to discharge a statutory duty incumbent on a public body, which did not shew why they were without funds or how they had disposed of their funds, was not considered sufficient (*h*).

(*x*) R. *v.* Oxen, 2 Salk. 429; R. *v.* Coventry, id. 430.

(*y*) See R. *v.* Staffordshire, 6 A. & E. 84.

(*z*) R. *v.* Lyme Regis, 1 Doug. 149.

(*a*) *Per* Lord Mansfield, R. *v.* Lyme Regis, 1 Doug. 158.

(*b*) See R. *v.* Exeter, Comb. 197.

(*c*) R. *v.* Round, 4 A. & E. 139. Patteson, J., said: "If any authority were cited to shew that the party, in his return to such a mandamus, is bound to shew what he has done with the thing demanded, this return might be objectionable; but no such authority has been cited, and I think none such exists."—Id. 142, 143. Cf. R. *v.* Payn, 6 A. & E. 403–406.

(*d*) R. *v.* Essex Commissioners of Sewers, 2 Str. 763.

(*e*) R. *v.* Great Western Railway Co., 1 E. & B. 780; cf. R. *v.* London and North Western Railway Co., 1 E. & B. 199, note (*a*).

(*f*) R. *v.* Ambergate, &c. Railway Co., 1 E. & B. 372, 381.

(*g*) R. *v.* Great Western Railway Co., 1 E. & B. 253.

(*h*) R. *v.* Luton Trustees, 1 G. & D. 248, 251; Cf. R. *v.* Com-

Where a mandamus ordered a railway company to lower a turnpike road, in accordance with a statutory obligation, a return to the effect that the existing state of the road was more convenient to the public was held bad (*i*). So as to a return justifying acts of diversion not *necessary* to the construction of the railway, though they would save expense and inconvenience to the company (*k*).

To a mandamus to a railway company to take up an award, it is a good return that the land alleged to have been injuriously affected, was not so affected within the meaning of the Lands Clauses Consolidation Act, 1845 (*l*).

In an old case (*m*), where a writ issued commanding a mayor to swear a person into office, a return that before the emanation of the writ this person was removed from the office, and that another person was elected, admitted, and sworn into it, was held insufficient as not answering the gist of the writ; for, by procuring another person to be chosen before the party elected can procure a writ, any officer might be kept out of his office.

When the writ commanded the defendant to take upon himself the office of councilman, a return setting forth a by-law by which persons refusing to fill the office were subject to a certain fine, which the defendant had paid, was held insufficient; as the bye-law did not state that the party paying it should be exempt from serving the office, or that the fine was to be in lieu of service (*n*). [★ 392] ★ To a writ to admit a person to the freedom of a town, a return that there were five certain court days kept yearly upon which all persons entitled have been admitted, and that notice had been given to the applicant of certain days on which he might have been admitted, notwithstanding which he did not appear, was held bad; as it did not state that a person could not be admitted except on those five days (*o*).

Where the writ ordered the defendants to pay moneys collected for the relief of the poor, under an order of the Poor Law Commissioners, to a board of guardians of a union, described in that order as duly appointed,

missioners, &c., of the Fens, 10 A. & E. 557, note (*b*); R. *v.* Eastern Counties Railway Co., 10 A. & E. 531; R. *v.* Manchester, &c., Railway Co., 2 Q. B. 47, 3 Q. B. 528.

(*i*) R. *v.* Manchester and Leeds Railway Co., 3 Q. B. 528.

(*k*) R. *v.* Wycombe Railway Co., 8 B. & S. 259.

(*l*) R. *v.* Cambrian Railway Co., 10 B. & S. 315.

(*m*) R. *v.* Stephens, Sir T. Ray, 431.

(*n*) R. *v.* Bower, 1 B. & C. 585.

(*o*) R. *v.* Whiskin, Andr. 1.

a return that the guardians were not duly appointed was held bad (*p*). The defect in their title, if any, ought to have been distinctly set forth, "but the statement that, for some undisclosed reason, the parties charged with a plain duty refused to perform it, because they chose to say, in general terms, that those to whom they are bound are not duly appointed to their office, is wholly insufficient" (*q*).

The case last referred to was distinguished by the Court from the cases where a return of "not duly elected" was held sufficient, in the writs commanding admission to corporate offices. In such cases the person elected has no right to compel admission without shewing a good title *in omnibus*, and he must be prepared to prove it; if his election *de facto* made, is bad in law for any defect, it would be wrong to admit him; but here the Comissioners had power to form unions, the board to whom the money was ordered to be paid was in full exercise of its authority, and the orders of the Commissioners, as to the payment of moneys collected for the use of the poor, had the force of law (*r*).

Where a mandamus commands the admission of any person to an office, a return of plenarty would be improper, as the writ does not determine the question of right (*s*); but a return that such person refused to be admitted was held good (*t*).

Where an amotion is only justifiable on written charges being exhibited against the officer, a return to a writ to restore him ★ alleging that "ar- [★ 393] ticles" were exhibited against him, but not stating that they were in writing, was held insufficient (*u*).

The return may be bad as relying on a custom not good in law (*x*).

If a custom to remove at will is relied on, the existence of such custom should be positively asserted in the return (*y*).

To a mandamus to restore to an office, it was held a bad return that the defendants did not know that the prosecutor had ever been elected to it (*z*).

(*p*) R. *v.* St. Andrew, Holborn, 10 A. & E. 736.
(*q*) *Per* Lord Denman, id. p. 739. (*r*) Ib.
(*s*) See R. *v.* Ward, 2 Str. 893. Distinguish R. *v.* Williams, Say. 140.
(*t*) R. *v.* Jorden, Bull. N. P. 201.
(*u*) R. *v.* Evans, 1 Show. 282.
(*x*) R. *v.* Wix, 2 B. & Ad. 197; Warren's case, Cro. Jac. 540; Crips *v.* Maidstone, 1 Keb. 812.
(*y*) R. *v.* Oxon, 2 Salk, 428; R. *v.* Coventry, 2 Salk, 430.
(*z*) Basset *v.* Barnstaple, 1 Sid, 286.

As to the sufficiency of returns justifying amotion from office and refusal to admit to it, see further, *post*, pp. 395 *et seq.*

Where the exercise of a discretion vested in the defendants is sought to be enforced, it is a sufficient return that they have exercised such discretion (*a*).

The return need not state the reasons why the discretion was exercised as it was, or the grounds of the decision; "for if a matter is left in the discretion of any individual or body of men, who are to decide according to their own conscience and judgment, it would be absurd to say that any other tribunal is to inquire into the grounds and reasons on which they have decided, and whether they have exercised their discretion properly or not; if such a power is given to any one, it is sufficient in common sense for him to say that he has exercised that power to the best of his judgment" (*b*).

The Courts have exacted from the defendant the utmost definiteness and certainty in the allegations of his return, and this not only before but also since the statute 9 Anne, c. 20 (*c*).

A return to a mandamus to restore, "*quod non constat nobis*" that the prosecutor was ever elected, was held insufficient (*d*).

[★ 394] ★ A return that the prosecutor did not account for corporation moneys received by him, was held bad, as not alleging a request and refusal (*e*). So was a return justifying an amotion on the ground of a specified offence "and other crimes," without specifying them (*f*); also a return alleging that the party had been heard in common council, without saying before whom (*g*); and that an "order" was made, disfranchising him, not saying that it was under the corporate seal (*h*).

A return to a writ to restore a deputy, that "*non fuit*

(*a*) See R. *v.* London, 3 B. & Ad. 255.

(*b*) *Per* Lord Tenterden, C.J., id 271. See also *per* Lord Denman, R. *v.* Ouze Commissioners, 3 A. & E. 544; R. *v.* Andover, Lord Ray. 710. Cf. R. *v.* Bishop of Gloucester, 2 B. & Ad. 158.

(*c*) R. *v.* York, 5 T. R. 69; R. *v.* Stirling, Say. 174. *Per curiam*, R. *v.* Pomfret, 10 Mod. 108; R. *v.* Monmouth, 4 B. & Ald., 496. See R. *v.* Lancaster, 2 Barn. 430; R. *v.* Brewers' Co., 4 D. & R. 492; R. *v.* Bristol Dock Co., 9 D. & R. 309, which shews that the old mode of pleading by a *protestando* was bad in a return.

(*d*) Case of Recorder of Barnstaple, Sir T. Ray. 153. See also Anon. 1 Vent. 267.

(*e*) R. *v.* Wilton, 5 Mod. 259.

(*f*) Ib.

(*g*) Ib.

(*h*) Ib. See also R. *v.* Gloucester, 3 Bulst. 189.

constitutus" deputy at the time of the writ, was held bad, as not alleging that he was not then deputy (*i*).

A return by a mayor and corporation that the prosecutor did not take the oath of allegiance "*coram nobis*" was held bad, as he might have taken it before two justices (*k*).

Where the office removed from was one held during the pleasure of the corporation, a return which shewed this only by a recital, and did not expressly allege that the corporation had the power claimed, was held insufficient (*l*).

As to the manner of alleging that the prosecutor had been summoned, before his amotion for misconduct, see *R.* v. *Glide* (*m*) and *R.* v. *Wilton* (*n*).

As the act of the mayor and a majority of the corporation is the act of the whole, the return should allege the act as that of the mayor and corporation (*o*). An amotion by them need not be said to be under seal (*p*).

Where the mandamus was to restore to the office of capital burgess, a return alleging as ground of amotion the non-attendance of the prosecutor at a meeting to which he was summoned for the election of a capital burgess, and averring that the right of such election is in the capital burgesses being the common council, was held bad for uncertainty: it did not definitely assert that the ★ prosecutor had a right to concur in the [★ 395] election, and ought to have obeyed the summons; and it was consistent with what it did aver that he had no such right, as it did not appear that all the burgesses were members of the common council (*q*).

Where the writ commanded a mayor to convene a meeting to fill up five vacancies in a select body, consisting of fifteen chief burgesses, a return that no election could be had because there were not within the borough eight legally elected chief burgesses by whom the election could be made, was held bad; as, though there might not be eight who were legally elected, some of those not legally elected might from lapse of time

(*i*) R. *v.* President and Council of the Marches, 1 Lev. 306, 2 Keb. 742.
(*k*) R. *v.* Oxon, 2 Salk, 429.
(*l*) R. *v.* Coventry, 2 Salk, 430.
(*m*) 12 Mod. 28. See also Braithwaite's case, 1 Vent. 19.
(*n*) *Ubi supra.*
(*o*) R. *v.* Shrewsbury, 7 Mod. 203; cf. R. *v.* Abingdon, 2 Salk, 431.
(*p*) Dighton *v.* Stratford-on-Avon, 2 Keb. 641.
(*q*) R. *v.* Lyme Regis, 1 Doug. 177.

have obtained unimpeachable titles, so as to leave a majority qualified to elect (*r*).

A return admitting that a meeting of the corporation was valid for some purposes, and averring that it was not a legal assembly for the purpose of electing a recorder, was held bad for not shewing in what respect they were not a legal assembly for that purpose (*s*).

Justifying amotion.

A return justifying amotion from office, except where the office is held at pleasure, should, in order to be good, shew (1) a power to remove, actually exercised by the body which possesses it; (2) the cause of a removal and the existence of such cause; and (3) that the person amoved was heard in his defense before removal.

1. In the case of a corporation the existence of a power of removal for reasonable cause need not be expressly stated in the return, because such a power is judiciously recognised as incident to the corporation, and quite apart from charter or prescription (*t*). But where the right of removal is claimed and exercised by a select part of the corporation, the return should allege this and state whether it is given by charter, or prescription, or bye-law made by the body having the power to make it (*u*).

If the power claimed by the corporation is to remove [★ 396] *ad libitum* ★ the return should also shew that the body possessing the power of removal was duly assembled, and exercised it in the proper manner, *e.g.*, by an order under the common seal, where that is necessary (*x*).

The neglect of a subordinate official to summon any member of a municipal corporation was formerly held to invalidate the proceedings of the meeting (*y*). And on this point of being duly assembled, great strictness was required in the return. An allegation that the common council were duly or in due manner met and

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(*r*) R. *v.* Monmouth, 4 B. & Ald. 496.

(*s*) See *per* Lord Kenyon, R. *v.* York, 5 T. R. 74.

(*t*) R. *v.* Lyme Regis, 1 Doug. 149; Bruce's case, 2 Str. 819; R. *v.* Richardson, 1 Burr. 517, 539; Haddock's case, Sir T. Ray. 439.

(*u*) See *per* Lee, C.J., R. *v.* Doncaster, Say. 38: "Such a power is, indeed, incidental to every corporation; but it never can be exercised by a part of a corporation, unless it is vested in that part by charter or prescription." The same applies to other bodies as well as corporations; see *per* Lord Kenyon, C.J., R. *v.* Faversham, 8 T. R. 356.

(*x*) See R. *v.* Chalke, Lord Ray. 226.

(*y*) See R. *v.* Shrewsbury, 2 Str. 1051. It is now provided by 45 & 46 Vict. c. 50, 2nd sched. 7, that "want of service of the summons on any member of the council shall not affect the validity of the meeting."

assembled was held insufficient, for not stating that they were *all* summoned (*z*).

In one case a return that the prosecutor was removed by thirty of the common councilmen "in the council chamber assembled" was held insufficient, as not shewing that they were then and there assembled as a common council; for they might be there to feast, or for other purposes (*a*).

Where the power of removal is vested in a select part of the entire body, the return should shew that they have been particularly summoned for the purpose (*b*).

2. Except where there is a power of removing *ad libitum*, the return must set forth the cause of removal, in order that the Court may pronounce upon its sufficiency; and must also shew that such cause actually existed.

The return, according to Lord Mansfield, must set out all the necessary facts precisely, to shew that the person is removed in a legal and proper manner, and for a legal cause; it is not sufficient to set out conclusions only; the facts themselves must be set out precisely that the Court may be able to judge of the matter; the cause of amotion should also be set out in the same manner, that the Court may judge of it (*c*).

Where neglect of duty is the ground of amotion, the return ★ must not allege a general neglect [★ 397] and omission, but must shew the particular instances of neglect and omission, that the Court may judge whether they are a good cause of removal (*d*).

A return that a man obstinately and voluntarily refused to obey several orders and laws made for the good of the borough, was held insufficient, because it did not shew the particular orders or laws disobeyed (*e*).

Where the misconduct had no reference to the particular office from which the prosecutor was removed, the return in that respect has sometimes been held insufficient; *e.g.*, where the removal was from the office of capital burgess for misconduct in the character of chamberlain (*f*).

(*z*) R. *v.* Liverpool, 2 Burr. 731.

(*a*) R. *v.* Taylor, 3 Salk. 231, 3 Bulst. 189.

(*b*) R. *v.* Carlisle, 1 Str. 385; cf. Machell *v.* Nevinson, 11 East, 84, note (*a*), and R. *v.* Doncaster, 2 Burr. 738.

(*c*) R. *v.* Liverpool, 2 Burr. 731; R. *v.* Shrewsbury, 7 Mod. 201; R. *v.* Chester, 5 Mod. 10.

(*d*) *Per* Lee, C.J., R. *v.* Doncaster, Say. 39.

(*e*) R. *v.* Doncaster, Lord Ray. 1566; cf. R. *v.* Shaw, 12 Mod. 113.

(*f*) R. *v.* Doncaster, Lord Ray. 1564; cf. R. *v.* Hutchinson, 8

Bankruptcy was no ground for removing a corporator at common law (*g*).

The return should also satisfy the Court that the charge has been proved (*h*). It is not enough to state that the prosecutor was present when the charge was made and did not deny it (*i*).

Suspension.—There appears to the author to be no valid ground of distinction, as regards the foregoing principles, between the case of amotion and that of a suspension for a time (*k*).

3. It must appear from the return that before removal on the ground of misconduct, an opportunity was given to the party removed of answering the charges against him (*l*).

"The want of a summons," it is said in one case (*m*), [★ 398] "is an ★ objection that can never be got over." There are, however, some exceptions.

As the only object of the summons is to give the accused an opportunity of clearing himself from charges which are the ground of his removal, where a summons is unnecessary for that purpose, its absence will not invalidate a removal; as, *e.g.*, where the accused appears and is heard in his defence (*n*); or where he had positively declared that he would no longer perform the duties of the office (*o*); or where the cause of removal is permanent nonresidence (*p*). Of course it is not necessary in the case of an office determinable at will (*q*), or by exercise of discretion (*r*).

Mod. 99, and R. *v.* Newbury, 1 Q. B. 751, 762, as to misconduct which would justify removal from the office of town clerk.

(*g*) See per Lord Mansfield, R. *x.* Liverpool, 2 Burr. 732. See now 45 & 46 Vict. c. 50, s. 39.

(*h*) R. *v.* Faversham, 8 T. R. 356. (*i*) Ib.

(*k*) See however R. *v.* Guilford, 1 Keb. 868, 880; R. *v.* Tyther, 2 Keb. 250; and *per* Ashurst, J., R. *v.* London, 2 T. R. 182.

(*l*) Bagg's case, 11 Coke, Rep. 99 b; R. *v.* Gloucester, 3 Bulst. 189 (*per* Coke, C.J.); R. *v.* Aldborough, 10 Mod. 101; R. *v.* Gaskin, 8 T. R. 209; R. *v.* Smith, 5 Q. B. 614 (both cases of a parish clerk and sexton), and R. *v.* Davies, 9 D. & R. 234; R. *v.* Darlington, 6 Q. B. 682; R. *v.* Langley, 5 Q. B. 619, note (*g*), and the cases referred to id. p. 622, notes (*c*) and (*d*); R. *v.* Saddlers' Co., 10 H. of L. Cas. 404.

(*m*) R. *v.* Cambridge, 8 Mod. 164; 1 Str. 567: *per* Fortescue, who refers to the earliest possible precedent on the point.

(*n*) See *per* Holt, C.J., R. *v.* Chalke, Lord Ray. 226; s. c. nom. R. *v.* Wilton, 2 Salk. 428.

(*o*) See R. *v.* Axbridge, 2 Cowp. 523.

(*p*) See R. *v.* Exon, 1 Show. 259; R. *v.* Truebody, 11 Mod. 75; Lord Ray. 1275; R. *v.* Shrewsbury, 7 Mod. 201; R. *v.* Lyme Regis, 1 Doug. 149.

(*q*) R. *v.* Oxon, 1 Str. 115; R. *v.* Deighton, 2 Keb. 656; Warren's case, Cro. Jac. 540; cf. R. *v.* Ipswich, 2 Salk. 435.

(*r*) See *per* Lord Denman in R. *v.* Darlington, 6 Q. B. 695, 696.

No particular form of summons is necessary; but it ought to be such as to give the prosecutor sufficient notice of the charges which he is called on to answer, so that he may come prepared to meet them (*s*).

Even though election and admission to the office have been obtained by the fraud of the prosecutor, his removal without being heard in his defence will not be excused (*t*).

Justifying amotion from municipal offices.

As already stated, a power of amotion is incident to every corporation (*u*). It is necessary, according to Lord Mansfield (*x*), to the good order and government of corporate bodies, that there should be such a power as much as the power to make bye-laws.

According to the same authority (*y*)—repeating the judgment in an earlier case—there are three sorts of offences for which an ★ officer or corporator [★ 399] may be discharged, viz.: (1) such as have no immediate relation to his office, but are in themselves of so infamous a nature as to render the offender unfit to execute any public franchise; (2) such as are only against his oath and the duty of his office as corporator [and are to the prejudice of the corporation (*z*)], and amount to breaches of the tacit condition annexed to his franchise or office; (3) offences of a mixed nature, as being an offence not only against the duty of his office, but also a matter indictable at common law.

Misconduct which is not of the first kind, and has no relation to the duties of the office, will not justify an amotion.

A return of an offence of the first mentioned kind should shew that there has been a conviction for the offence; for, according to Lord Mansfield (*a*), "it is now established that though a corporation has express power of amotion, yet for the first sort of offence there must be a previous indictment and conviction"; *e.g.*, cases of general perjury, forgery, libelling, &c. (*b*). In such

(*s*) See R. *v.* Glide, 12 Mod. 28. *Per* Lord Hardwicke, R. *v.* Shrewsbury, 7 Mod. 202; Braithwaite's case, 1 Vent. 19.

(*t*) See R. *v.* Saddler's Co., 10 H. of L. Cas. 404.

(*u*) See *per cur.* Bruce's case, 2 Str. 819; per Lee, C. J., R. *v.* Doncaster, Say. 38, ante, p. 395; *per* Lord Kenyon, C.J., R. *v.* R. *v.* Faversham, 8 T. R. 356.

(*x*) R. *v.* Richardson, 1 Burr. 539, dissenting from what is stated in Bagg's case (11 Rep. 99a.) that there can be no power of amotion unless given by charter or prescription.

(*y*) R. *v.* Richardson, 1 Burr. 538, 539; R. *v.* Liverpool, 2 Burr. 732. See also R. *v.* Derby, Cas. t. Hard. 154, 155.

(*z*) *Per* Lord Hardwicke, R. *v.* Derby, Cas. t. Hard. 154.

(*a*) R. *v.* Richardson, *ubi supra.*

(*b*) It was held in a previous case (Anon., 2 Show. 183) that

cases it is the loss of credit which is the ground of forfeiture, and therefore conviction, which is the ground of infamy, ought to precede the disfranchisement (*c*).

Bribing a burgess to vote for a member of parliament (*d*) has been held an offence of the first kind, and therefore requiring a conviction in order to a good return.

As to the second class of offences, viz., those against his oath and the duties of his office, no conviction need be stated in the return (*e*). Indeed, as observed by Lord Mansfield (*f*), where the offence is merely against his duty as a corporator, he can only be tried for it by the corporation.

[★ 400] ★ Under this head seem properly to come returns that an alderman deserted his office, and absented himself from the council (*g*); and that contrary to his oath *spoliavit et dilaceravit* certain Court records (*h*).

A return of an absenting himself from sessions which did not hinder the holding of a Court or the validity of the acts of the Court, was held bad (*i*).

A return which did not shew a total desertion, but only a temporary absence from the borough of which a man was alderman, was held bad (*k*).

That an alderman had lent money to young men by

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where a conviction disabled a man from holding the office of alderman, a return of the offence without stating a conviction for it, was good.

(*c*) See judgment in R. *v.* Derby, Cas. t. Hard. 154, 155; R. *v.* Lane, Lord Ray. 1304. See *per* Holt, C. J., R. *v.* Gloucester, Holt, 450.

(*d*) Parret's case, cited Cas. t. Hard. 155. But in R. *v.* Hutchinson, 8 Mod. 99, the Court were divided in opinion as to the necessity of a conviction, where the prosecutor had bribed one of the corporation to vote for a mayor.

(*e*) See R. v. Derby, Cas. t. Hard. 154, 155. R. *v.* Hutchinson, 8 Mod. 99.

(*f*) R. *v.* Richardson, 1 Burr. 539.

(*g*) City of Exeter *v.* Glide, 4 Mod. 33, 36; Comb. 197; cf. R. *v.* Leicester, 4 Burr. 2087, and R. *v.* Truebody, 11 Mod. 75. 45 & 46 Vict. c. 60, s. 39, now provides that "if the mayor, or an alderman, or councillor is (except in case of illness) continuously absent from the borough, being mayor for more than four months, or being alderman or councillor for more than six months, he shall thereupon immediately become disqualified and shall cease to hold the office. In any such event the council shall forthwith declare the office to be vacant and signify the same by notice signed by three members of the council and countersigned by the town clerk and fixed on the town hall, and the office shall thereupon become vacant."

(*h*) Wigan *v.* Pilkington, 1 Keb. 597.

(*i*) R. *v.* Pomfret, 10 Mod. 108.

(*k*) R. *v.* Exon, 1 Show. 258; R. *v.* Leicester, 4 Burr. 2087.

the hands of his wife was held an insufficient ground of amotion (*l*).

A return setting forth an offence of the third kind is also good, without a previous conviction.

Some difficulty on this point was caused by a passage in *Bagg's* case, that "if a party be *convicted* of an offence against his duty, and to the prejudice of the corporation, it is good cause to remove him," which would seem to imply that a previous conviction is necessary; but, according to Lord Hardwicke (*m*), this is not so, "for if the whole paragraph be considered, it is plainly spoken only of such cases where there is no power of amotion."

A return was held good which justified amotion on the ground of the prosecutor having, when the council met, with several other persons riotously assembled in the street over against the common hall, to the disturbance of the council, and did then and there assault the constables and an alderman as he was going to the common hall, and prevented him and several other persons from going to ★ the business of the [★ 401] corporation, &c.; that he had been summoned to shew cause why he should not be disfranchised, and did not appear: and an objection that there should have been a previous conviction was overruled (*n*).

A return justifying amotion on the ground of erasing the books of the corporation, which did not aver that the entry erased was such as it should be, or that the rasure was to the detriment of the corporation, was held insufficient (*o*).

It has been said that slanderous words may justify amotion from a town council; but, in order to do so, they must have reference to the corporation, and not to the character of a particular member of it, as *e.g.*, an alderman (*p*).

Some kinds of misconduct which have been held to justify removal are not easily ranged under any of the three heads mentioned by Lord Mansfield, *e.g.*, that, in case of an alderman, he was a common drunkard (*q*).

(*l*) R. *v.* Gloucester, 3 Bulst. 189.

(*m*) R. *v.* Derby, Cas. t. Hard. 155.

(*n*) R. *v.* Derby, *ubi supra*. Haddock's case, Sir T. Ray. 435, was a somewhat similar case.

(*o*) R. *v.* Chalke, Ld. Ray. 226. See this case commented on, Cas. t. Hard. 155.

(*p*) Jay's case, 1 Vent. 302. A custom to disfranchise for speaking opprobrious words of an alderman was held bad in Clark's case, 1 Vent. 327. See also *per cur.* Earle's case, Carth. 176.

(*q*) R. *v.* Taylor, 3 Salk. 231: 3 Bulst. 189 (*nom.* R. *v.* Gloucester).

Other grounds which have been held sufficient, in returns justifying amotion from corporate offices, are, that the prosecutor was not elected (*r*); or that he was not elegible for election (*s*); or non-performance of some condition precedent, as that he did not take the oaths required by statute (*t*); or that he has taken another office incompatible with that from which he was removed (*u*); or that he was elected for a limited period which has expired (*x*). But it was held that if the return alleged the ground of invalidity in the election, and that ground was insufficient, the return was bad (*y*).

In one case it was held a bad return that the prosecu- [★ 402] tor was ★ incapable of being elected alderman on account of non-residence (*z*); but this descision would probably not now be followed (*a*).

Customary power of removal.

The return of the custom to remove *ad libitum* was held good in the case of a councillor (*b*); but bad in the case of an alderman (*c*). Such a power of removal *ad libitum* has sometimes been conferred by letters patent (*d*).

A return was upheld which shewed a customary right for each mayor to remove the existing town clerk, and appoint a new one (*e*).

Election obtained by fraud.

It seems that a body corporate cannot itself remove a corporator on the ground that his admission was procured by fraud practised on itself; for, as observed by Blackburn, J. (*f*), it would, in exercising such a power, necessarily act as judge in its own cause, with every conceivable temptation to judge partially.

Facts justifying amotion should be stated.

The return justifying amotion from municipal offices or privileges should set out the particular facts pre-

(*r*) R. *v.* Cambridge, 2 T. R. 456.
(*s*) R. *v.* Cambridge, *ubi supra.*
(*t*) R. *v.* London, 12 Mod. 17; R. *v.* Love, 12 Mod. 601.
(*u*) See R. *v.* Sandwich, 2 Keb. 92; R. *v.* Pateman, 2 T. R. 777.
(*x*) See R. *v.* Durham, 10 Mod. 146, where in the case of an annual office a return was held bad which alleged that the prosecutor was *annuatim eligibilis*, instead of saying *eligibilis pro uno anno tantum.*
(*y*) Warden *v.* Rous, 7 Mod. 323.
(*z*) R. *v.* Doncaster, Say. 40.
(*a*) See R. *v.* Cambridge, 2 T. R. 456, as to councillors.
(*b*) R. *v.* Coventry, 2 Salk. 430; Warren's case, Cro. Jac. 540.
(*c*) Crips *v.* Maidstone, 1 Keb. 812; Warren's case, *ubi supra.*
(*d*) See Dighton's case, 1 Vent. 82 (the case of a town clerk).
(*e*) R. *v.* Campion, 1 Sid. 14, 15.
(*f*) R. *v.* Saddlers' Co., 10 H. L. Cas. 423. See also *per* Crompton, J., p. 437, 438; *per* Cockburn, C. J., p. 455, 456. See also the judgment of Lord Chelmsford. It was unnecessary expressly to decide the point in this case.

cisely, to shew that the person is removed in a legal and proper manner, and for a legal cause (*g*). The matter should be so alleged that the Court may be able to judge of it and determine whether it be a sufficient cause or not (*h*). The return must also shew that the party has been summoned to answer for his misconduct (*i*); or at least has been heard in his defence (*k*); and that the removal has taken place at a properly convened meeting (*l*).

When the ground of removal is non-residence, the return need not shew a previous summons to come and reside (*m*).

★ Where the power of amotion was by [★ 403] charter in the mayor, bailiffs, and such burgesses as had been mayors, a return justifying an amotion "*per majorem et burgenses, authoritate et secundum chartam*" was held sufficient; as it would be intended that all the burgesses were present and agreed (*n*).

A return justifying amotion from such an office as that of recorder, on the ground of not attending to the duties of the office, in order to be good, should shew a general neglect or refusal; a determined neglect, a wilful refusal (*o*).

Where a person was removed from his freedom of a company for misconduct, a return stating the misconduct, and alleging that the prosecutor, being present at a meeting of the company, was called on to shew cause why he should not pay certain forfeitures imposed by the company's bye-laws, but that he did not shew any cause nor ask for time to enable him to do so, but declared that he would not pay the forfeitures, was held bad, as not shewing that the charge against the prosecutor was proved (*p*).

A return justifying the suspension of an attorney

(*g*) *Per* Lord Mansfield, R. *v.* Liverpool, 2 Burr. 731.

(*h*) *Per* Holt, C.J., R. *v.* Abingdon, 2 Salk. 432; Braithwaite's case, 1 Vent. 20; Crisps *v.* Maidstone, 1 Keb. 812; Warren's case, Cro. Jac, 540.

(*i*) See Exeter *v.* Glide, 4 Mod. 37; Bagg's case, 11 Rep. 99; *per* Holt, C. J., R. *v.* Exeter, Comb. 198; R. *v.* Brayfield, 2 Keb. 488; R. *v.* Glide, 12 Mod. 28.

(*k*) R. *v.* Chalke, Lord Ray, 225.

(*l*) See R. *v.* Shrewsbury, 2 Str. 1051. See now, as to corporations, 45 & 46 Vict. c. 50, 2nd sched. 7.

(*m*) R. *v.* Lyme Regis, 1 Doug. 149.

(*n*) Braithwaite's case, 1 Vent. 19, 20.

(*o*) *Per* Lord Mansfield, R. *v.* Wells, 4 Burr. 2004; cf. R. *v.* Bristol, 1 Show. 288. R. *v.* Ipswich (Serjeant Whitaker's case), 2 Salk. 434.

(*p*) R. *v.* Fishermen of Faversham, 8 T. R. 352.

from practicing in a Court within the County Palatine of Chester, on the ground of contemptuous words spoken to the presiding officer, who thereupon suspended him was held good (*q*).

Removal by part of governing body.

Where a power of removal is not given to any particular part of a body, it rests with the body at large; and a return justifying amotion should shew that this was the act of the whole body. If the amotion was by a part of the body, a return to be good must shew that such part had the power of removing (*r*).

Irregular but justifiable removal.

If the return shews that the prosecutor was removed in an irregular manner, a peremptory mandamus will not be granted, if the return shews also that there was good ground of amotion (*s*).

Return where there is a visitor.

Where there is a visitor, who has jurisdiction in the matter, the return need not shew the cause of amo- [★ 404] tion (*t*). "Should it ever ★ happen that there is a cause of amotion over which the visitor has not jurisdiction, it lies upon the party to shew it who seeks to take it *ad aliud examen*" (*u*).

In the case of colleges, &c., where there is a visitor, if a mandamus to restore is granted, a return of a sentence of deprivation for enormous crimes (without specifying them) affirmed by the visitor is sufficient (*x*).

Office held at pleasure.

Where an office is held at pleasure, a return that by an exercise of such pleasure the prosecutor was removed, is sufficient (*y*). The return need not state the manner nor the cause of his removal (*z*); nor that he was previously summoned (*a*).

Justifying refusal to admit to office.

A return, to a mandamus to admit, that the prosecutor was not elected or not duly elected to the office to which he seeks admission has been held sufficient, without specifying in what particular respect his title to it

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(*q*) Parker's case, 1 Vent. 331.

(*r*) See *per* Lord Kenyon, R. *v.* Faversham, 8 T. R. 356; *per* Lee, C.J., R. *v.* Doncaster, Say. 38.

(*s*) R. *v.* Griffiths, 5 B. & Ald. 731.

(*t*) See R. *v.* Chester, 15 Q. B. 513, 519; *per* Holt, C.J., Philips *v.* Bury, 2 T. R. 356; Appleford's case, 1 Mod. 82.

(*u*) *Per* Lord Campbell, 15 Q. B. 519, 520.

(*x*) Appleford's case, 2 Keb. 861; 1 Mod. 82; R. *v.* St. John's, Oxford, 4 Mod. 368.

(*y*) Pepis' s case, 1 Vent. 342; Warren's case, Cro. Jac. 540; R. *v.* Oxon, 1 Str. 115; S. *v.* S., 2 Salk. 429; R. *v.* Cambridge, 2 Show. 69; R. *v.* Taunton, St. James, 1 Cowp. 413; R. *v.* Coventry, 2 Salk. 430; Dighton *v.* Stratford-on-Avon, 2 Keb. 641, 656. A different view was taken in Blagrave's case, 2 Sid. 72; cf. R. *v.* Slatford, Comb. 419.

(*z*) R. *v.* Cambridge, *ubi supra.*

(*a*) R. *v.* Oxen, 1 Str. 115.

is defective (*b*). So has a return that he has failed to perform any preliminary to his admission required by law, *e.g.*, the taking of the oaths required by statute (*c*).

Where the writ commanded the admission and swearing in of a churchwarden who "had been duly nominated, elected and sworn," a return that he was not duly elected into the place and office of churchwarden was held good (*d*). But to a writ which merely stated that he had been elected, a return that he had not been duly elected was considered bad (*e*).

Where the writ was to swear in two churchwardens as "*debite electi*," a return that they were not duly elected, which did not add *nec aliquis eorum*, was held insufficient (*f*).

★ To a writ commanding the swearing in [★ 405] of a churchwarden chosen by the parish, a return that he was a poor dairyman and servant, had no real or personal estate, and was unfit for the office, was held bad (*g*). So, in a similar case, was a return that there were two causes depending at the time to determine who had been properly elected churchwardens (*h*).

The existence of cross mandamuses was held no excuse for disobedience; the defendant should obey both, the writ not determining any right (*i*). A return to a mandamus to swear in churchwardens that, before the coming of the writ, the defendant received an inhibition from the bishop with a signification that he had taken upon himself to act in the premises, was held bad (*k*).

Return in nature of a demurrer.

The return, instead of traversing the material allegations of the writ or alleging new facts as a reason for non-obedience, may consist merely of a submission that the facts alleged in the writ do not impose any legal obligation to do the act or acts commanded (*l*).

(*b*) See the cases referred to, *ante*, pp. 387, 389, 401, as to aldermen, councillors, &c.

(*c*) See R. *v.* Bosworth, 2 Str. 1112; cf. R. *v.* March, 2 Burr. 999.

(*d*) R. *v.* Williams, 8 B. & C. 681. See R. *v.* Harwood, 8 Mod. 380 note (*c*), Lord Ray, 1405; R. *v.* Penrice, 2 Str. 1235; R. *v.* Twitty, 2 Salk. 434. Cf. R. *v.* White, 8 Mod. 325, and the opinion thereon of Lord Raymond cited in note (*a*) thereto.

(*e*) See R. *v.* Guy, 6 Mod. 89.

(*f*) R. *v.* Guise, 3 Salk. 88, 6 Mod. 89. Cf. R. *v.* Twitty, 2 Salk. 434.

(*g*) R. *v.* Rees, 12 Mod. 116.

(*h*) R. *v.* Harris, Burr. 1420.

(*i*) Id. 1422, 1423. See also Carpenter's case, Sir T. Ray. 439.

(*k*) R. *v.* Simpson, 1 Str. 609, 8 Mod. 325.

(*l*) See, for example, the return in R. *v.* St. Pancras, 6 A. & E. 316, 1 N. & P. 507. Lord Denman points out that the defendants might have, on the same grounds, moved to quash the writ. 1 N. & P. 509.

Where the return was of such a kind the old procedure was to obtain a concilium, and have the validity of the return determined on argument; or else to move to have the return quashed on the ground of its insufficiency (*m*). See now the procedure described in the next chapter.

When to be made.

The writ may be made returnable forthwith; or time may be allowed to return it, either with or without terms, as the Court thinks fit (*n*).

The time may be enlarged by the Court or a judge (*o*).

By whom to be made.

The return should be made by the person or persons to whom the writ is rightly addressed, and on whom the duty of obedience is incumbent (*p*).

[★ 406] ★ Should it be directed incorrectly, a return by the proper body in its right name will be good, *e.g.*, a return, by the mayor, aldermen, and council, to a writ wrongly directed to the mayor and aldermen only (*q*).

Where the writ is directed to a corporation, the return should be made by the majority of the corporation with the concurrence of the mayor; and, per Holt, C.J., the return must come by the mayor's hands into Court (*r*); but if a majority of the corporation make a return in his name, it shall be taken to be his if he do not come and disavow it (*s*).

The mayor is not authorized to make a return without the consent of the majority (*t*); and a return by him falsely professing to be that of the majority has led the Court to grant an attachment against him (*u*).

Though made by the mayor and a majority only, it should still be made in the name of the entire corporation, by its proper title (*x*).

(*m*) If the defendant, instead of moving to quash the writ, makes a return in the nature of a demurrer, counsel for the Crown have the right to begin. R. *v.* St. Pancras, 6 A. & E. 317; S. *v.* S., 3 A. & E. 538 note (*a*).

(*n*) C. O. R. 68, 232. (*o*) C. O. R. 293, Order LXIV., r. 7.

(*p*) See R. *v.* Clitheroe, 6 Mod. 133.

(*q*) R. *v.* Mills, 1 Keb. 623. (*r*) R. *v.* Abingdon, 12 Mod. 308.

(*s*) R. *v.* Chapman, 6 Mod. 152.

(*t*) *Per* Holt, C.J., R. *v.* Abingdon, *ubi supra*.

(*u*) R. *v.* Hoskins, Cas. t. Hard. 188. But in R. *v.* Abingdon, 2 Salk. 431, the Court refused to enter, upon affidavits, into the question whether the consent of the majority had been given. In another case, where the writ was addressed to the mayor and jurats, and they could not agree on a return, the matter was by consent tried in a feigned issue. R. *v.* Rye, 2 Burr. 798.

(*x*) See *per* Lord Hardwicke, R. *v.* Shrewsbury, 7 Mod. 203. Cf. R. *v.* Baily, &c., of Brecknock, 1 Keb. 33, 34, where one part of the corporation was allowed to make one return, and the other part another.

Where the mandamus was to the mayor, bailiffs, and burgesses of a borough, the mayor was allowed (at his peril) to make the return in his own name (*z*).

And where the writ was addressed to the head of a college by name, he was held to be the proper person to make the return; the college seal being unnecessary (*a*).

A return by a corporation, not under the common seal or under the hand of the mayor, was also held sufficient (*b*).

Where the writ was rightly addressed to the bailiffs and ★ constables, a return by the deputy- [★ 407] constable and suitors was held bad (*c*); so was a return by the mayor and commonalty, where the writ was directed to the mayor, alderman, common council and chamberlain (*d*); so, also, where the writ was directed to the alderman, bailiffs, and commonalty, was a return by the bailiffs and capital burgesses, without the commonalty (*e*).

Where the body to which the mandamus is addressed has regularly resolved upon and made a return, individual dissentients will not be allowed to dispute its propriety (*f*).

Return by persons other than those to whom writ is directed.

When it appears to the Court that the respondent claims no right or interest in the subject-matter of the application, or that his functions are merely ministerial, the return to the writ, and all subsequent proceedings down to judgment, shall still be made and proceed in the name of the person to whom the writ is directed, and, if the Court thinks fit so to order, may be expressed to be made on behalf of the persons really interested therein (*g*).

In such case the persons interested shall be permitted to frame the return and conduct the subsequent proceedings at their own expense; and, if judgment is given for or against the applicant, it shall likewise be given for or against the persons on whose behalf the return is expressed to be made; and if judgment is given for them, they shall have the same remedies for enforcing it as the person to whom the writ is directed would have in other cases (*h*).

(*z*) R. *v.* Abingdon, 2 Salk. 431.

(*a*) R. *v.* St. John's College, Cambridge, 4 Mod. 241.

(*b*) R. *v.* Thetford, 1 Salk. 192, where it is said that at common law no officer was bound to sign a return.

(*c*) Catchin & Wargar, 23 Car. 1, cited 1 Keb. 33.

(*d*) R. *v.* Canterbury, Comb. 213.

(*e*) R. *v.* Baily, &c., of Brecknock, 1 Keb. 33.

(*f*) *Per* Lord Denman, R. *v.* St. Andrew's, 7 A. & E. 284. Distinguish R. *v.* St. Saviour's, 7 A. & E. 925.

(*g*) C. O. R. 73. (*h*) Id.

Under the similar provision in sect. 4 of 1 Wm. 4, c. 21, the Court required to be satisfied of the *bona fides* of the applicant; and, when not satisfied of it, refused him permission to frame the return (*i*). When so satisfied, even after demurrer to the return made, it allowed the party really interested to make an additional return (*k*).

The person really interested, who desires to frame the return, should apply to the Court for permission to do so.

[★408] ★The application is made by motion, supported by affidavit, to a Divisional Court, for an order *nisi* (*l*).

Effect of death resignation or removal of person to whom writ is directed, in such a case.

Where under the rule just cited, the return to a writ of mandamus is expressed to be made on behalf of some person other than the person to whom the writ is directed, the proceedings on the writ shall not abate by reason of the death, resignation, or removal from office of that person, but they may be continued or carried on in his name; and, if a peremptory writ is awarded, it shall be directed to the successor in office or right of that person (*m*).

Disavowing return.

Where the return was not really that of the person or persons from whom it professed to come, the Court has allowed him or them to come in and disavow it (*n*), and to make another return (*o*).

The application was made before the return was filed, and was to stay the filing of it (*p*).

But where a mayor made a return which was not that of the majority of the corporation, the practice appears to have been not to allow them to disavow it, but to leave them to their remedy against the mayor by criminal information (*q*).

The return might be withdrawn by leave of the Court (*r*).

How to be made.

The return is usually made on a separate parchment

(*i*) R. *v.* Cheek, 16 L. J. M. C. 65, 9 Q. B. 942.

(*k*) R. *v.* Paynter, 14 L. J. M. C. 182.

(*l*) C. O. R. 253, 254. The case is not one of those mentioned in r. 255, in which notice is necessary. It would be prudent, however, to give all parties notice.

(*m*) C. O. R. 74. 1 Wm. 4, c. 21, ss. 4 and 5, contained provisions of a somewhat similar kind.

(*n*) See *per* Holt, C.J., R. *v.* Abingdon, Holt, 440, 2 Salk. 431.

(*o*) Id.

(*p*) Id. At the time these cases were decided, the return could not be filed without obtaining the leave of the Court.

(*q*) R. *v.* Abingdon, *ubi supra;* R. *v.* Hoskins, Cas. t. Hard. 188. Cf. case of Abingdon, Carth. 499.

(*r*) R. *v.* Barker, Burr. 1379.

annexed to the writ, the latter being indorsed as in the form of return given in the Appendix, *post*.

A short return, such as of obedience, &c., may be made on the back of the writ itself (*s*).

When made by anybody other than a corporation aggregate, it should be signed with the name or names of the person or persons ★ making it; but a re- [★409] turn not so signed but indorsed, "the answer of A. B., &c.," was in one case held sufficient (*t*).

The return of a corporation aggregate is most appropriately made under its common seal; but this is not necessary (*u*).

In former days the Court sometimes required a return on oath (*x*).

Filing return.

If the writ is returnable in Court, the writ and return are to be filed in the Crown Office. If the writ is returnable before a judge, it is to be filed after the decision of the judge thereon, with the return and any order made thereon, or a copy of such order (*y*). It is filed, when left at the Crown Office, by the proper officer.

It must be filed within the time limited in the writ, unless an extension of such time is obtained.

It is irregular to file a return after the death of the person who makes it (*z*); but this does not apply to the death of the person to whom the writ is directed, where another person is allowed to make the return (*a*).

After filing it cannot be amended or altered without leave of the Court (*b*).

Taking return off the file.

The Court has ordered a return improperly filed to be taken off the file, *e.g.*, where filed after the death of the person who made it (*c*).

But the validity of a return or the truth of its contents will not be determined in this summary way (*d*).

Compelling return.

If the writ be not returned according to the exigency thereof, the prosecutor may obtain an order of course (*e*)

(*s*) In R. *v.* Birmingham, &c., Railway Co., 1 E. & Bl. 294, Coleridge, J., said: "Mr. Corner, of the Crown Office, tells us that returns are frequently made on copies."

(*t*) R. *v.* St. John's College, Skin. 368; R. *v.* Oxford, Palm. 451.

(*u*) Powell *v.* Price, Comb. 41; R. *v.* St. John's College, id. 279; case of Thetford, 1 Salk. 192; R. *v.* Exeter, 12 Mod. 126. *Contrà*, Morgan *v.* Carmarthen, 3 Keb. 350.

(*x*) See for example, Jay's case, 1 Vent. 303; *per* Hale, C.J., Manaton's case, Sir T. Ray. 365.

(*y*) C. O. R. 233. (*z*) See R. *v.* Holmes, Burr. 1641.

(*a*) C. O. R. 74.

(*b*) London *v.* Estwick, Styles, 33, 35; R. *v.* Holmes, 3 Burr. 1644.

(*c*) R. *v.* Holmes, 3 Burr. 1641.

(*d*) See R. *v.* Payn, 6 A. & E. 403.

(*e*) C. O. R. 252 (*i*).

at the Crown Office to return it, which order shall require the return to be made within four days next after service of the order, if served in London or Middlesex, and within eight days in all other cases (*f*).

Should this order be disobeyed, an application may be made for an attachment, on affidavit of service of the order and non-compliance therewith (*g*).

[★410] ★ The application for an attachment for contempt is by motion for an order *nisi;* and the order *nisi* must be personally served (*h*).

Such an application, it seems, may be made without an order having been obtained or served to return the writ, on proof of personal service of the writ (*i*).

Should an officer, upon disallowance of one return, make a second bad one, the Court in former times would have granted an attachment (*k*); also where the return was of a frivolous kind made to avoid the justice of the Court (*l*). An attachment would probably now be granted only where the return was intended to be of a contemptuous character.

Quashing. If the return, taken as a whole, did not supply a justification for disobedience to the mandatory clause of the alternative writ, it might, according to the old practice, be quashed on motion, on the ground of insufficiency (*m*).

The return might also be quashed on the ground of the inconsistency or repugnancy of the causes re-

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(*f*) Id. 233.

(*g*) Where the writ was served personally, personal service of the rule was not required; but where the writ was not personally served, the Court, before granting an attachment, required personal service of the rule (1 Gude's C. P. 184; Corner's C. P. 227, 228.

(*h*) C. O. R. 261.

(*i*) 1 Gude's C. P. 184, 185. As to the old practice, see *per curiam*, R. *v.* Thetford, 6 Mod. 25; R. *v.* Rye, 2 Burr. 798.

(*k*) See *per* Holt, C.J., Anon., 12 Mod. 410.

(*l*) R. *v.* Robinson, 8 Mod. 336. In 1 Keb. 101, the case of a bishop of Durham is referred to, who was fined £2000 for not returning a mandamus. And a mayor was fined £5, besides having an attachment granted against him, for a similar cause (R. *v.* Oxford, Latch. 229).

(*m*) See R. *v.* St. Andrew's, Holborn, 10 A. & E. 736; R. *v.* Oundle, 1 A. & E. 283; R. *v.* Market Street, Manchester, 4 B. & Ad. 333, note (*a*); R. *v.* March, 2 Burr. 999; R. *v.* Wix, 2 B. & Ad. 197. *Per* Lord Denman, R. *v.* St. Katharine's Dock, 4 B. & Ad. 363. The Court sometimes granted an attachment for making a frivolous return to a mandamus (R. *v.* Robinson, 8 Mod. 336. See R. *v.* Payn, 6 A. & E. 405), or a shuffling return (R. *v.* Dorchester, cited 1 Barn. 82). An officer was also liable to be amerced for a bad return (*per* Holt, C.J., Anon., 12 Mod. 410; see R. *v.* Raines, 2 Salk. 233.

turned, *e.g.*, that a person was elected alderman, but not having received the sacrament within a year he was refused admission by the mayor and aldermen, &c., and, at the end of the return, *quod non fuit electus* (*n*); or where the return (1) alleged as cause of amotion of a burgess that he did ★ not attend at the [★ 411] sessions according to his duty, and (2) alleged matter proving that he had never been elected, so that he had no right to attend (*o*); or where a return by a corporation denied that there was a valid meeting of the corporation on the day in question, and at the same time set forth various acts done at it on which the corporation relied as legal and valid acts (*p*).

But an inconsistency, where the matter was merely surplusage, was regarded as immaterial (*q*).

A return justifying an amotion on the grounds (1) that the prosecutor was not duly elected (*r*); (2) that there was a custom to remove at pleasure, and that he was removed pursuant to such custom, was held not to be inconsistent or repugnant. "There is no repugnancy," said Lord Mansfield, "in saying that he was not duly elected, but that being *in fact* elected, they had, according to an ancient custom, removed him from the office" (*s*).

And the Court might quash parts of the return, and leave the prosecutor to plead to the rest (*t*).

A return was never quashed because filed too late; being once on the file, it stood (*u*).

On shewing cause against a rule to quash his return, the defendant might urge any objection shewing that the writ ought never to have issued (*x*).

On the return being quashed, a peremptory mandamus generally issued; but this was not always the case (*y*).

(*n*) R. *v.* Norwich, Ld. Ray. 1244. Cf. R. *v.* Buckingham, 10 Mod. 173.

(*o*) R. *v.* Pomfret, 10 Mod. 108.

(*p*) R. *v.* Mayor of York, 5 T. R. 66, 74.

(*q*) Lord Hawley's case, 1 Vent. 144.

(*r*) Cf. R. *v.* Old Hall, 10 A. & E. 248.

(*s*) R. *v.* Taunton, St. James, 1 Cowp. 413.

(*t*) See R. *v.* Cambridge, 2 T. R. 456, 461, 462. Cf. *per* Lord Denman, R. *v.* North Midland Railway Co., 11 A. & E. 955, note (*c*).

(*u*) *Per* Lord Denman, R. *v.* Kendall, 1 Q. B. 374.

(*x*) See *per* Parke, J., R. *v.* St. Katharine's Dock Co., 4 B. & Ad. 363; *per* Abbott, C.J., R. *v.* Margate Pier Co., 3 B. & Ald. 223, 224. It was not necesseary to serve the order absolute to quash; it was drawn up and entered at the Crown Office.

(*y*) See *per curiam*, R. *v.* Raines, 3 Salk. 233. Cf. R. *v.* Griffiths, 5 B. & Ald. 731, and R. *v.* Mayor of London, 2 T. R. 177.

Objection by demurrer.

All the instances above cited of quashing a return were before the statute 6 & 7 Vict. c. 67. By sect. 1 of that Act it was provided that wherever the prosecu- [★ 412] tor wished or intended to object to ★ the validity of a return, he should do so by way of demurrer to the writ, in such and the like manner as was practised and used respectively in personal actions.

Previously to this enactment objection to the validity of the writ could not have been taken by demurrer; and the object of the Act, as stated in the preamble, was to substitute for the existing procedure, by which the legal sufficiency of returns was determined, another procedure on which error could be brought (*z*).

Present procedure.

The procedure by demurrer has in turn been abolished (*a*); and objection to the sufficiency of the return is now to be taken by the prosecutor's reply. Vide *post*, p. 416.

Amending.

Leave to amend an insufficient return was sometimes given after motion to quash (*b*).

Amendments of clerical mistakes and, generally, amendments "tending to the furtherance of justice" have long been freely permitted (*c*).

The Court would not, however, at the instance of the prosecutor compel the defendant to amend his return (*d*).

See now the large powers of amending given by r. 12, Order XXVIII., of the Supreme Court Rules and Orders (*e*).

(*z*) Corner, C. O. Pr. 230 (1st ed.), is of opinion that the power of the Court to quash a return was not taken away by the Act.

(*a*) Order XXV., rr. 1 and 2, C. O. R. 136. See next Chapter.

(*b*) See R. *v.* London Dock Co., 5 A. & E. 163, note (*a*).

(*c*) R. *v.* Chichester, 1 Show. 273; R. *v.* Lyme Regis, 1 Doug. 136, 137 (see note 4); R. *v.* Marriott, 1 D. & R. 166; R. *v.* Bristol, 1 Show. 288; cf. R. *v.* Grampond, 7 T. R. 699.

(*d*) R. *v.* Marriott, *ubi supra.*

(*e*) C. O. R. 299.

★CHAPTER X. [★413]

PROCEEDINGS SUBSEQUENT TO RETURN.

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Practice previous to 9 Anne, c. 20.

PREVIOUSLY to the statute 9 Anne, c. 20, s. 2, applicable to Municipal offices only, extended to all other cases by 1 Wm. 4, c. 21, s. 3, the prosecutor was not allowed to traverse, by pleading, the truth of the return. His only remedy was an action on the case (or, where the right involved was not a private but a public one, a Criminal Information) for the false return; and this he was not permitted to bring before the sufficiency in law of the return had been first determined.

Under 9 Anne, c. 20, and 1 Wm. 4, c. 21.

These statutes not only enabled the prosecutor to plead to, or traverse, all or any of the material facts alleged in the return, but also allowed the person or persons making the return to reply, take issue, or demur to the prosecutor's pleas; and the proceedings were otherwise assimilated to those in an action.

If the prosecutor succeeded in his action for a false

[★414] return, or ★ on the pleadings substituted for it by 9 Anne, c. 20, s. 2, and 1 Wm. 4, c. 21, s. 3 (repealed by 46 & 47 Vict. c. 49, s. 3), he was entitled to a peremptory mandamus; but, in order to obtain it, he had to apply to the Court on motion, supported by affidavits stating the facts of the case. The motion was for a rule *nisi* for a peremptory mandamus, against which cause might be shewn; and the peremptory writ was granted only after the rule had been made absolute. Two exceptions were introduced by 6 & 7 Vict. c. 67, ss. 1 and 2, viz. (1) where the Court overruled a demurrer to a return, it might by its judgment award that a peremptory mandamus should issue; and (2) in case a writ of error was brought, the Court of Error might also by its judgment award that a peremptory writ should issue.

New procedure.

This cumbrous procedure has now given way to one simpler and more expeditious, by which the prosecutor, whenever he obtains judgment on an issue of law or fact going to the root of the return, may by the judgment obtain forthwith the issue of a peremptory mandamus. Vide *post*, p. 416.

By No. 136 of the new Crown Office Rules, when any return is made to the first writ of mandamus, the applicant may plead to the return within such time and in like manner as if the return were a statement of defence delivered in an action; and, subject to these rules, this pleading and all subsequent proceedings, including pleadings, trial, judgment and execution, shall proceed and may be had and taken as if in an action.

But, as already stated, the Court or a judge may, if they or he shall think fit, order that any writ of mandamus shall be peremptory in the first instance (*a*).

Discretionary refusal.

The Court retains to the last its discretionary power of refusing the peremptory writ, even in cases where the prosecutor succeeds in his traverses of the return, or the return itself is held bad: *e.g.*, where the mandamus was to restore, and immediately after restoration the applicant might again be removed (*b*); or where it appears from the return that, from any other cause, he ought not to be restored (*c*).

[★415] ★ The opinion of Blackburn, J., given in 1863 (*d*), was opposed to this. "Though on the rule," he remarked, "the Court may refuse to grant a man-

(*a*) C. O. R. 69. See R. *v.* Fox, 2 Q. B. 246.
(*b*) R. *v.* Griffiths, 5 B. & Ald. 731.
(*c*) See *per curiam*, R. *v.* Raines, 3 Salk. 233, (12).
(*d*) R. *v.* Saddler's Co., 10 H. L. Cas. 423, 424.

damus, if upon the whole the judges think it clear that no good end could be obtained, because at that stage of the proceedings the Court can exercise discretion, and has the means of ascertaining all the facts which should guide it in the exercise of its discretion; yet when the writ has issued, the peremptory writ ought to be granted or refused according to what appears to be the legal right on the record; for then the Court must give a judgment on which error may be brought, and therefore must proceed on those grounds which may be brought into the Court in error;" and he pointed out that there was no means of bringing to the knowledge of the Court in error those collateral matters which might shew whether it was or was not discreet to issue the writ. For these reasons he was of opinion that "judgment ought to be given in any case of mandamus according to what appears on the record to be the legal right, and not according to discretion."

But *cessante ratione, cessat ipsa lex:* for the Court of Error existing at the time this opinion was delivered is now substituted a Court of Appeal, which rehears the whole case, on notice of motion in a summary way, with full discretionary power to receive further evidence (*e*).

New writ. Where there was a mistake in the peremptory writ, the Court permitted a new one to issue (*f*).

Pleadings subsequent to return. As to the pleadings subsequent to return, the time for delivering them, &c., see the rules set forth *ante*, pp. 181–184, when dealing with *quo warranto;* all of which apply to the case of mandamus also (*g*).

Under the old system of pleading in mandamus, the prosecutor met the defendant's return by a plea, to which the defendant might reply, the prosecutor rejoining, &c.; the nomenclature of the pleadings being thus the reverse of that in ordinary actions. Now, as the return is treated as a statement of defence (*h*), the prosecutor will meet it with a reply, to which the respondent may rejoin, &c.; so that the names of the pleadings are the same as those in an action.

★ Where the return to the alternative writ [★ 416] was one of unconditional compliance, it was argued, on the construction of Order LIII., r. 9, of the Supreme Court Rules, 1883, that the prosecutor could not traverse the return by pleading, and that his only remedy was by action for the false return; but it was held, by

(*e*) Order LVIII., rr. 1, 4.
(*f*) R. *v.* Lyme Regis, 20 Geo. 3, referred to 1 Gude, C. P. 191.
(*g*) C. O. R. 293. (*h*) Id. 136.

a Divisional Court and the Court of Appeal, that the prosecutor could plead to such a return, denying its truth (*i*).

Rule 136 of the new Crown Office Rules expressly applies to all returns to the first writ of mandamus.

Demurrer. As all pleadings and proceedings subsequent to the return are to be as in an action (*k*), a demurrer is no longer allowed (*l*).

Any point of law may be raised in the reply to the return (*m*); and by consent of the parties or by order of the Court or judge it may be set down for hearing and disposed of (*n*).

Where no issue of fact, but only a point of law. Where a point of law is raised in answer to a return or any other pleading in mandamus, and there is no issue of fact to be decided, the Court shall, on the argument of the point of law, give judgment for the successful party, without any motion for judgment being made or required (*o*).

Where judgment is so obtained the applicant shall be entitled forthwith to a peremptory writ of mandamus to enforce the command contained in the original writ; and the judgment shall direct that a peremptory writ do issue (*p*).

Where the issue is of fact. Where the issue joined is one of fact, and the prosecutor obtains judgment, he is also entitled forthwith to a peremptory writ; and the judgment shall direct that it do issue (*q*).

Delay. Where the prosecutor, after return made, unreasonably delayed taking any further step, the Court made absolute a rule to pay the costs of opposing the issue of the writ unless, within a given time, the prosecutor proceeded to traverse or impeach the return (*r*).

Non-compliance. The rules set forth, *ante*, p. 74, as to the effects of non-compliance, are applicable to the case of mandamus (*s*).

Amendment. As to the powers of amendment which the Court now [★ 417] possesses, ★ vide *ante*, pp. 182–184; all the rules there set forth being applicable in the case of mandamus (*t*).

Interpleader. Whenever a proceeding by interpleader would be proper, the provisions of Order LVII. of the Supreme Court Rules, 1883, are to apply (*u*).

Special case. These rules enable the Court or a judge, where the

(*i*) R. *v.* Pirehill North, L. R. 13 Q. B. D. 696, 14 Q. B. D. 13. (*k*) Id. 136. (*l*) Order XXV., r. 1. (*m*) Id., r. 2. (*n*) Id. (*o*) C. O. R. 70. (*p*) Id. 71. (*q*) Id. 71, 136. (*r*) R. *v.* Dartmouth, 2 Dowl. N. S. 980. (*s*) C. O. R. 303. (*t*) C. O. R. 299. (*u*) Id. 75.

question is one of law, to order that a special case be stated for the opinion of the Court (*x*).

As to special cases generally, vide *ante*, p. 84 (*y*).

Directing an issue.

The rules also empower the Court or a judge to direct the trial of an issue of fact (*z*).

Settlement of issues.

As to the settlement of issues where they are not sufficiently defined, see Order XXXIII., r. 1.

Admissions.

As to admissions of fact and judgment thereupon, see Order XXXII., rr. 4 and 5.

Notice of trial, &c.

All subsequent proceedings up to and including trial, judgment, and execution, are to be the same as in an action (*a*). See the rules set forth *ante*, pp. 189 *et seq.*, all of which (substituting "prosecutor" for "relator") are applicable to mandamus.

Notice to admit, &c.

As to notices to admit and produce, and as to discovery, inspection and interrogatories, vide *ante*, pp. 191 *et seq.*

Obtaining copies of proceedings.

Copies of the mandamus and return, and traverse or other pleadings thereupon shall, when required, be made at the Crown Office and delivered to the respective parties or other parties requiring the same on payment of the proper charges (*b*),

Trial.

As to the various modes of trial, the obtaining a trial at bar, making up the record, the jury process, &c., vide *ante*, pp. 79 *et seq.*

Verdict.

The verdict may cure a defective statement of a valid claim in the writ (*c*).

Damages.

By statutes 9 Anne, c. 20, ss. 2, 3, and 1 Wm. 4, c. 21, s. 3 (which allowed the return to be traversed), in case of a verdict for the prosecutor, or judgment given for him on demurrer, or by *nil dicit*, ★ or for [★ 418] want of replication or other pleading, he might recover his damages and costs in such manner as he might have done in an action on the case for a false return; and in case any damages should be so recovered against any person or persons making the return, such person or persons should not be liable to be sued in any other action or suit for the making of such return. Both of these enactments are repealed by 46 & 47 Vict. c. 49, s. 3; but it has been held that the procedure under them is preserved by Order LXXII., r. 2, and Order LXVIII., r. 1,

(*x*) Order LVII., r. 9.

(*y*) For examples of special cases, see R. *v.* London Dock, 5 A. & E. 163; R. *v.* Stafford, 7 East, 521.

(*z*) Order LVII., r. 7. For an example under the old practice, see R. *v.* Rye, Burr. 798.

(*a*) C. O. R. 136.

(*b*) Id. 138. See Appendix, *post*, pp. 615 *et seq.*

(*c*) See Delamere *v.* R., L. R. 2 E. & I. App. 419.

of the Supreme Court Rules, 1883, in all cases where no other procedure is substituted for it (*d*).

The method provided by these repealed statutes for enabling the prosecutor to obtain damages and costs being thus preserved, it is not necessary to bring an action for a false return, according to the old common law method of proceeding.

It was contended in one case (*e*) that the damages and costs were recoverable under these statutes only where the prosecutor might have recovered damages in respect of a particular injury in an action on the case for a false return; and that they were not recoverable in cases where no private but only a public right was concerned, and where, consequently, the remedy before the statutes was not by action but by criminal information. But the Court (of Queen's Bench, affirmed by the Exchequer Chamber) held that a successful prosecutor was entitled to his damages and costs in all cases, whether an action for a false return on the ground of a particular injury sustained by him would lie or not.

Where no injury to a private right has been done, the damages can of course, be only nominal; and where the jury in such a case omitted to find damages, the judge who tried the cause was held entitled to order, from his recollection, the verdict to be entered on the postea for nominal damages (*f*).

Without damages, according to Lord Denman (*g*), there could be no costs.

Signing judgment.

As to the mode of entering judgment, vide *ante*, pp. 199, 200.

New trial.

A new trial may be moved for as in an action. For the procedure, vide *ante*, pp. 88, 89 (*h*).

Effect of death of prosecutor.

[★419] ★ The new Crown Office Rules have no provision relating to the death of the prosecutor; though they deal (*i*) with the case of the respondent dying, where he claims no right or interest in the subject-matter, or where his functions are merely ministerial.

The Irish Court of Queen's Bench held that they had no power to grant the personal representative of the deceased prosecutor liberty to continue the mandamus proceedings (*j*); but this was in 1855.

(*d*) See R. *v.* Pirehill, L. R. 14 Q. B. D. 20.

(*e*) R. *v.* Fall, 1 Q. B. 636.

(*f*) Id. A verdict for the Crown without damages was held by the House of Lords to be a nullity: Kynaston *v.* Shrewsbury, 2 Str. 1051.

(*g*) R. *v.* Fall, *ubi supra*.

(*h*) For an example see R. *v.* Manchester, 9 Q. B. 464.

(*i*) C. O. R.

(*j*) R. *v.* Waterford, &c., Railway Co., 4 Ir. C. L. R. N. S. 249.

Of necessity, the proceedings must in many cases abate by reason of the death of the prosecutor; as where a mandamus is asked to compel his election, admission, or restoration to an office. But where the right sought to be enforced is not of this purely personal kind, there is no reason why the death of the prosecutor should cause an abatement; *e.g.*, in the case of a claim to compensation for lands compulsorily taken. And as all the proceedings subsequent to return are now to be as in an action (*k*), the provisions of r. 1 of Order XVII. of the Supreme Court Rules, 1883, are applicable in all cases where the duty sought to be enforced is one which the respondent owes also to the prosecutor's representative or successor.

Costs.

The costs of and incident to all proceedings are now in the discretion of the Court or judge; provided that where any matter or issue is tried with a jury, the costs shall follow the event, unless the judge by whom it is tried, or the Court, shall for good cause otherwise order (*l*).

As to the costs of proceedings in the name of a person whose functions are merely ministerial, see No. 73 of the new Crown Office Rules, and *ante*, p. 407.

And, generally, on the subject of costs, see the rules set out in the Appendix, *post*, all of which are applicable to the case of mandamus.

When and how application for costs to be made.

Every application for the costs of a mandamus shall, unless the Court or a judge shall otherwise order, be made before the fifth day of the sittings next after that in which the right to make such application accrued, and shall be upon notice of motion to be served eight days before the day named therein for moving (*m*).

★ The party moving must leave, at the [★ 420] Crown Office Department, a notice for the production in Court of all the affidavits filed in support of and in opposition to the original order (*n*).

Error.

Proceedings in error, as well as bills of exceptions, have been abolished; and an appeal to the Court of Appeal, by notice of motion in a summary way substituted (*o*); no petition, case, or formal proceeding other

(*k*) C. O. R. 136. (*l*) Order LXV., r. 1; Order LXVIII., r. 2.

(*m*) C. O. R. 77. A *Regula Generalis* of Trinity Term, 1867, ordered that application for the costs of a mandamus should be made within two terms of the obeying of a writ (7 B. & S. 399). The following cases dealt with the question of costs: R. *v.* Allen, L. R. 8 Q. B. 76; Ludlow Union *v.* Birmingham Union, 31 L. T. N. S. 587. (*n*) C. O. R. 78.

(*o*) Order LVIII., r. 1. Error was held to be a *supersedeas* to a peremptory mandamus: Ruding *v.* Newel, 2 Str. 983.

than such notice of motion being henceforth necessary.

Appeal.

All the rules of Order LVIII. of the Supreme Court Rules and Orders, 1883, apply to mandamus (*p*). See these various rules set forth, *ante*, pp. 210–212.

Protection to persons obeying writ.

No action or proceeding shall be commenced or prosecuted against any person in respect of anything done in obedience to a writ of mandamus issued by the Supreme Court or any judge thereof (*q*).

Action for false return.

The old common law procedure by action on the case (*r*) for a false return referred to *ante*, p. 413, has not been abolished, and may still be had recourse to (*s*); though the changes introduced by 9 Anne, c. 20, enlarged by 1 Wm. 4, c. 21, and continued by Crown Office Rule 134, will probably render it obsolete.

As a return might be quashed if bad in law, or if merely frivolous, the action has been held maintainable only in respect of a return which had been held good in law (*t*).

An action would lie for a return true in words but false in substance (*u*).

If the prosecutor obtained judgment in the action, he was entitled (on motion to the Court for the purpose) to a peremptory mandamus, if the action had [★421] been brought in the Queen's Bench, but ★not if brought in any other Court (*x*). On reversal, however, of its own judgment for the defendant (by the Exchequer Chamber or House of Lords), the Court granted a peremptory mandamus (*y*).

All who joined in the mandamus might join in the action for a false return (*z*); and the action, being one of tort, might be brought against any of the persons who made the return, without joining the others (*a*).

(*p*) C. O. R. 216. (*q*) Id. 72.

(*r*) See for examples Crawford *v.* Powell, 2 Burr. 1013; Rich *v.* Pilkington, Carth. 171; Butler *v.* Palmer, 1 Salk. 190; Enfield *v.* Hills, Sir T. Jones, 116; Vaughan *v.* Lewis, Carth. 277; Soane *v.* Ireland, 10 East, 250; Freeman *v.* Phillips, 4 M. & S. 486; Nightingale *v.* Marshall, 2 B. & C. 313; Faulkner *v.* Elger, 6 D. & R. 517.

(*s*) See the judgments in R. *v.* Pirehill North, L. R. 14 Q. B. D. 17–21.

(*t*) Com. Dig. Mandamus (D. 6); Enfield *v.* Hills, 2 Lev. 236.

(*u*) Braithwaite's case, cited 1 Dough. 159.

(*x*) See *per* Holt, C.J., R. *v.* Green, Skin. 670; Anon., 2 Salk. 428.

(*y*) Foot *v.* Prowse, 2 Str. 697.

(*z*) See Green and Others *v.* Pope, Lord Ray. 125; Anon., 3 Salk. 202; cf. R. *v.* Andover, 12 Mod. 332; Butler *v.* Rews, id. 349, 371.

(*a*) Rich *v.* Pilkington, Carth. 171; cf. the fifth ruling in R. *v.* Chapman, 6 Mod. 152.

It was confined to cases of private right, the remedy in cases of a public right being a criminal information (*b*).

The action was local and must have been laid, at the election of the plaintiff, in the county where the return was made, or in the county where the Court in which it was recorded sat (*c*). But local venue for the trial of any action is now abolished, except where otherwise provided by statute (*d*).

Production of the writ and return filed in the Crown Office was held sufficient proof of the return having been made by the defendant (*e*). And, where the action was brought in any other Court than the Queen's Bench, the propriety of issuing the mandamus was not allowed to be questioned in the action (*f*).

Criminal information for false return.

Where a public right only was involved, and consequently no action could be brought for individual injury sustained by the prosecutor, the only common law method of proving the return false, and thereby entitling the prosecutor to a peremptory mandamus, was a criminal information against the person or persons who made the false return (*g*).

★ After verdict for the Crown, a fine was [★ 422] imposed on the defendant, and a peremptory mandamus was obtainable on motion.

The information was granted against particular persons, even where the return was under the common seal of a corporation (*h*).

Since the decision in *R.* v. *Fall* (*i*) in 1841, that the statute 1 Wm. 4, c. 21, had in effect done away with the distinction between matter of public interest and matter of individual damage, so far as regards the remedy

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(*b*) See *per* Lord Hardwicke, R. *v.* Spotland, Cas. t. Hard. 184; R. *v.* Fall, 1 Q. B. 636.

(*c*) Lord *v.* Francis, 12 Mod. 408; Anon., 12 Mod. 515.

(*d*) Order XXXVI., r. 1, of the Supreme Court Rules and Orders.

(*e*) See R. *v.* Chapman, 6 Mod. 152.

(*f*) Green and Others *v.* Pope, Lord Ray. 125, 126. See and distinguish Clarke *v.* Leicestershire, &c., Canal Co., 6 Q. B. 898, 902. See also R. *v.* Margate Pier Co., 3 B. & Ald. 220, and R. *v.* Ledgard, 1 Q. B. 616.

(*g*) "Here there cannot be an action for a false return, because no one is particularly interested; so there is no remedy but an information, and there being a direct contrariety in the affidavits, it is the course of the Court to grant an information to try the fact." *Per* Lord Hardwicke, R. *v.* Spotland, Cas. t. Hard. 185.

(*h*) See case of the Surgeons' Co., 1 Salk. 374; and for examples of informations against mayors, R. *v.* Chapman, 6 Mod. 152; R. *v.* Abingdon, 12 Mod. 308; Anon., Lofft, 185; and against justices, R. *v.* Pettiward, 4 Burr. 2452; cf. R. *v.* Lancashire, 1 D. & R. 485; R. *v.* Corbett, Sayer, 267.

(*i*) 1 Q. B. 636; *ante*, p. 418.

by mandamus (*k*), prosecutors have been able to traverse the truth of the return in cases relating to public as well as to private rights; and the remedy by information has become unnecessary.

The peremptory writ is in the same form as the alternative writ first granted, with the omission of the words "or that you shew us cause to the contrary thereof."

Like the alternative writ, it is issued at the Crown Office Department of the Central office (*l*).

It is to be prepared by the solicitor or party suing it out, and to be written or printed on parchment; and, before being sealed, it must be indorsed with the name and address of such solicitor or party, and if sued out by the solicitor as agent, with the name and address of the principal solicitor also; and it is to be entered at the Crown Office in a book to be kept for the purpose (*m*).

It must also bear date on the day on which it is issued, and be tested at the Royal Courts of Justice, London, in the name of the Lord Chief Justice of England (*n*).

Peremptory mandamus.

The peremptory writ should not differ from the alternative writ in any material particular. The Court has in days of greater strictness refused to grant a peremptory writ in a form at all different from that of the al- [★ 423] ternative writ; saying that the writ ★ must be enforced in the terms in which it first issued, or not at all (*o*).

Service.—It is issued and served in the same manner as the alternative writ (*p*).

Return.—The only permissible return to the peremptory writ is one of obedience. The Court will not even allow a return stating an attempt to comply with the writ and the causes of failure (*q*).

An order of course to return the writ may be drawn up at the Crown Office without motion for the same (*r*).

Quashing or setting aside peremptory writ.

The Court may quash the peremptory writ if convinced, on any ground, that it ought not to have issued; *e.g.*, if it appears that the defendant has no power to do that which the mandamus requires him to do (*s*). And the Court has allowed the validity of the peremp-

(*k*) See *per* Lord Denman, C.J., 1 Q. B. 649.
(*l*) C. O. R. 229. (*m*) Id. 230. (*n*) Id. 231.
(*o*) See the judgments in R. *v.* St. Pancras, 3 A. & E. 542, 543; R. *v.* London, 13 Q. B. 1, 41 (*per* Parke, B.), it is different as to the rule, id.; R. *v.* Leicester, 7 D. & R. 373.
(*p*) Vide *ante*, p. 380.
(*q*) R. *v.* Poole, 1 Q. B. 616. (*r*) C. O. R. 252, (*i*).
(*s*) See In the matter of Long, 14 L. J. Q. B. 146.

tory writ to be questioned, even on an application for an attachment for not obeying it (*t*).

If, after judgment for the Crown, the defendants voluntarily perform the duty sought to be enforced, the issue of a peremptory writ is unnecessary, a mere waste of time and expenses; and the Court will quash it on motion (*u*).

A peremptory writ has also been set aside where it issued whilst cross rules, as to how the verdict should be entered, yet remained to be argued (*x*).

The peremptory writ will not, however, be denied merely on the ground that the defendants are no longer occupants of the office which would enable them to obey it, when they might have obeyed the first writ whilst in office (*y*). "Though it may be a very good reason for not proceeding against them for disobedience, that they are now out of office, it is no reason why the writ should not go so as to entitle the prosecutor to his costs" (*z*).

Execution. ★ Execution is to proceed as in an action (*a*). [★ 424]

See the various rules as to execution set forth *ante*, pp. 214–220.

The judgment may be enforced by writ of attachment or by committal (*b*).

Attachment.—A writ of attachment cannot be issued without the leave of the Court or a judge. It must be applied for on notice to the party against whom the attachment is to be issued (*c*), who is thus entitled to shew cause in the first instance (*d*).

The application should be supported by an affidavit of service of the peremptory writ.

On the application for an attachment, objection may be taken to the validity of the peremptory mandamus (*e*).

(*t*) R. *v.* Poole, 1 Q. B. 616; 1 G. & D. 728.
(*u*) R. *v.* Saddlers' Co., 4 B. & S. 570; 32 L. J. Q. B. 337; R. *v.* King's Lynn, Gude's C. P. 192.
(*x*) R. *v.* Baldwin, 8 A. & E. 947.
(*y*) R. *v.* Allen, L. R. 8 Q. B. 69; 42 L. J. Q. B. 37.
(*z*) *Per* Blackburn, J., L. R. 8 Q. B. 76.
(*a*) C. O. R. 136.
(*b*) Order XLII., r. 7, C. O. R. 217.
(*c*) Order XLIV., r. 2, C. O. R. 217.
(*d*) The old practice was to move for a rule *nisi* for an attachment, on affidavits of service of the peremptory mandamus. Cause was subsequently shewn against the rule, which was discharged or made absolute in the ordinary way. See 1 Gude's C. P. p. 185.
(*e*) See R. *v.* Poole, 1 G. & D. 728; 1 Q. B. 616.

Sequestration.—Any judgment or order against a corporation wilfully disobeyed, may also, by leave of the Court or a judge, be enforced by sequestration against the corporate property, or by attachment against the directors or other officers thereof, or by writ of sequestration against their property (*f*).

Præcipe.—As to the necessity of filing a *præcipe* before issuing any writ of execution, the mode of doing so, and the manner of endorsing it, vide *ante*, p. 215.

As to the mode of issuing, preparing, sealing, and testing writs, vide *ante*, pp. 215, 216.

The Court or a judge, besides or instead of proceeding against the disobedient party for contempt, may direct that the act required to be done may be done, so far as practicable, by the party by whom the judgment or order has been obtained, or some other person, appointed by the Court or judge, at the cost of the disobedient party; and, upon the act being done, the expenses incurred may be ascertained in such manner as the Court or a judge may direct, and execution may issue for the amount so ascertained and costs (*g*).

Against whom attachment issues.

[★ 425] ★ The general rule is that all those to whom the writ is directed are liable to attachment for disobedience to it; but there is an exception in the case of a corporation: an attachment will not be granted against the whole body, but only against those individual members of it who refuse to execute the writ (*h*).

A writ has been directed to the inhabitants of a parish generally; and those inhabitants on whom it should be served would be liable to punishment for disobedience (*i*).

An attachment was, in one case (*k*), granted against the two bailiffs of a borough, though one of them was desirous of obeying the writ, but was unable to do so owing to the action of the other; the reason being that they were both to be considered as one officer (*l*).

(*f*) Order XLII., r. 31.

(*g*) Order XLII., r. 30, C. O. R. 217.

(*h*) R. *v.* Poole, 1 Q. B. 616; 1 G. & D. 728. "Where a mandamus is directed to a corporation to do a corporate act and no return is made, the attachment is granted only against those particular persons who refuse to pay obedience to the mandamus; but where it is directed to several persons in their natural capacity, the attachment for disobedience must issue against all, though when they are before the Court the punishment will be proportioned to their offence." R. *v.* Salop, Buller's N. P. 201, cited 1 Gude, C. P. 189.

(*i*) *Per* Lord Tenterden, C.J., R. *v.* Wix, 2 B. & Ad. 203.

(*k*) Case of Bridgnorth, 2 Str. 808.

(*l*) S. c. 1 Barn. 53.

★PART IV. [★426]

PROHIBITION.

CHAPTER I.

NATURE AND EXTENT OF THE JURISDICTION.

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Object of the jurisdiction.

"As all external jurisdiction, whether ecclesiastical or civil, is derived from the Crown, and the administration of justice is committed to a great variety of courts, hence it hath been the care of the Crown that these courts keep within the limits and bounds of their several jurisdictions prescribed them by the laws and statutes of the realm. And for this purpose the writ of prohibition was framed" (*a*).

A prohibition, according to Blackstone (*b*), is a writ . . . . directed to the judge and parties of a suit in any inferior court, commanding them to cease from the prosecution thereof; upon a suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court.

Whence the writ issued.

Though the writ issued most frequently (and, according to Blackstone, properly only) out of the Court of Queen's Bench, it might also issue out of the Court of Chancery, the Court of Common ★ Pleas, or [★427]

(*a*) Bac. Abr., tit. Proh. "All lawful jurisdiction is derived from and must be traced to the royal authority. Any exercise, however fitting it may appear, of jurisdiction not so authorized, is an usurpation of the prerogative, and a resort to force unwarranted by law." *Per* Willes, J., Mayor, &c., of London *v.* Cox, L. R. 2 E. & I. App. 254.

(*b*) 3 Com. 112.

the Court of Exchequer (*c*); but, whenever issued out of the Court of Chancery, it was either not returnable at all, or returnable only in the Queen's Bench or Common Pleas (*d*).

In former times it could be obtained from a Court of Common Law only in term time, whereas the Court of Chancery could grant a prohibition in vacation as well as in term time (*e*). Lord Redesdale, in the Irish Court of Chancery (*f*), refused to entertain an application for a prohibition in term time, when the Common Law Courts were open, saying that Lord Thurlow had also refused to do so (*g*).

The Petty Bag Act of 12 & 13 Vict. c. 109, s. 48, gave the control of the writ, when issued out of Chancery, to the Courts of Common Law (*h*).

To what Courts.

In the opinion of Lord Coke, there was no court which might not be restrained by prohibition. "We here in this court," said he, in one case (*i*) "may prohibit any court whatsoever, if they transgress and exceed their jurisdiction. And there is not any court in Westminster Hall but may be by us here prohibited, if they exceed their jurisdictions; and all this is clear and without any question."

This view of the matter appears to have lasted some time, though I can find no reported case in which a prohibition was actually granted by the Queen's Bench to any of the courts of common law at Westminster (*k*), or to the Court of Chancery (*l*).

(*c*) It is said in 2 Roll. Abr. 318, that the courts of law in Chester might grant a prohibition to the spiritual court there; and in Com. Dig. Prohib. 3, it is said that the Court of Great Sessions in Wales might do the same, referring to Winn's case, 1 Sid. 92, where the reporter adds a *quære*.

(*d*) According to Coke (4 Inst. 81), it was not returnable; but if not obeyed the Court of Chancery granted an attachment returnable in B. R. or C. P. In Bacon's Abr. tit. Prohibition (A) it is said to have been returnable in B. R. or C. P.

(*e*) Anon., 1 P. Wms. 476, case 135.

(*f*) Montgomery *v.* Blair, 2 Sch. & Lef. 135, 136.

(*g*) See also *Re* Foster, 3 Jur. N. S. 1238; *Re* Bateman, L. R. 9 Eq. 660.

(*h*) *Per* Willes, J., Mayor, &c., of London *v.* Cox, L. R. 2 E. & I. App. 291.

(*i*) Warner *v.* Suckerman, 3 Bulst. 120.

(*k*) In the Year Book 38 H. 6, 14, there is a case beginning thus: "A prohibition was sued out of Chancery directed to the justices of the Common Bench to make attachment, &c." But Eyre, C.J., says with reference to it: The first line of that case, after all the pains we have taken, remains altogether unintelligible." (Jefferson *v.* Bishop of Durham, 1 Bos. & P. 126.)

(*l*) The Exchequer Division made an order restraining an action brought in the Chancery Division and removing it into the

★ In one case (*m*), temp. 25 Car. 2, a de- [★428] fendant at law, against whom judgment had been recovered, having filed his bill in Chancery to be relieved from this judgment, and the Court of Chancery having overruled the plaintiff's plea of the judgment, the plaintiff moved to have the Court of Chancery prohibited. Hale, C.J., directed that the plaintiff should move the Court of Chancery to have the plea set down again to be heard, and when it should be overruled again, then the Court would consider whether a prohibition should be granted. But nothing more is told us of the case.

In a later case (*n*), a prohibition was moved for by a person claiming as purchaser of certain lands, to stay a sequestration of them under a decree in a Chancery suit against the defendant in that suit. Holt, C.J., refused, on the ground that the applicant might bring his action at Common Law, if turned out of possession; adding, that if the motion for a prohibition had been made on behalf of the defendant in the Chancery suit, it would be another question.

In 1819, an application was made for a prohibition to be directed to the Lord Chancellor sitting in bankruptcy; but it became unnecessary to decide the question whether a prohibition would lie, as the Court was of opinion that there had been no excess of jurisdiction (*o*). In delivering the judgment of the Court, Abbott, C.J., said: "We wish not to be understood as giving any sanction to the supposed authority of this Court to direct a prohibition to the Lord Chancellor sitting in bankruptcy. We do not decide against such an authority, because we have not heard the question fully argued. It will be time enough to decide that question when it necessarily arises, if ever it shall do so; which is not very ★probable, as no such [★429] question has arisen since the institution of proceedings in bankruptcy, a period little short of 300 years. If ever the question shall arise, the Court whose assistance may be invoked to correct an excess of jurisdiction in

Exchequer Division, on the ground that the matters in question in the action concerned Her Majesty's revenue and privileges; s. 24, sub-s. 5, of the Judicature Act, 1873, being held to be not binding on the Crown (Attorney-General *v.* Constable, L. R. 4 Ex. D. 172.) An action of trespass brought on the plea side of the Exchequer Division had previously, for a similar reason, been restrained by injunction; the Attorney-General having filed an information on the revenue side of that Division, involving the same questions as those in the action (Attorney-General *v.* Barker, L. R. 7 Ex. 177.)

(*m*) King *v.* Welby, Sir T. Ray. 227.

(*n*) Davy's case, Lord Ray. 531.

(*o*) *Ex parte* Cowan, 3 B. & A. 123.

another will, without doubt, take care not to exceed its own" (*p*).

The matter is now one of merely historic interest, as the Courts of Chancery, Common Pleas, Exchequer, and Bankruptcy, have ceased to possess a separate existence, being all merged in the High Court of Justice by the Judicature Act, 1873, and the Bankruptcy Act, 1883; and by sect. 24, sub-sect. 5, of the former Act, it is provided that, "no cause or proceeding at any time pending in the High Court of Justice, or before the Court of Appeal, shall be restrained by prohibition or injunction."

The fusion has put a stop also to the scandal of going from one court to another, and repeating in one court an application which had been refused, on the same materials, by other courts of co-ordinate jurisdiction (*q*).

Privy Council.

The case of the Judicial Committee of the Privy Council stands in a like position to that of the Court of Chancery before the Judicature Acts. The authority to restrain by prohibition any excess of authority on its part is several times asserted; but we find the Courts always evading an express decision of the point; nor is any case reported in which the asserted authority has ever been actually exercised.

In 1838 the Court of Queen's Bench was asked to prohibit the Privy Council from proceeding with an appeal from the Arches Court on a question of church rates, on the ground that the rate was bad; but the Court refused the application, Lord Denman, C.J., saying: "If, in the progress of the cause, the Ecclesiastical Court should commit any error, if they do anything against common law or Act of Parliament, we may then interfere" (*r*).

The case of the Judicial Committee of the Privy [★ 430] Council, as now ★ the ultimate Court of Appeal in ecclesiastical matters—having transferred to it (by 2 & 3 Wm. 4, c. 92) the jurisdiction of the old Court of Delegates—was very fully considered by almost all the judges in the recent case of *Martin* v

(*p*) Ib. 130.

(*q*) See *per* Lord Campbell, in Harrington *v.* Ramsay, 2 E. & B. 669. In the case of applications for prohibitions to county courts, sect. 44 of 19 & 20 Vict. c. 108, provided that on refusal by any superior court or judge no other superior court or judge should grant the writ, unless the second application were on grounds different from those on which the first application was founded.

(*r*) Chesterton *v.* Farlar, 7 A. & E. 713.

Mackonochie (*s*); and the weight of judicial opinion, as expressed in the Court of Appeal, was strongly against the existence of a jurisdiction to prohibit such a tribunal, though it was unnecessary to decide the point.

Cockburn, C.J., indeed, in the court below, asserted the existence of the jurisdiction in language as uncompromising as that of Lord Coke (*ante*, p. 427): "It is the province of this Court to restrain all tribunals not forming part of the High Court of Justice, or having appellate jurisdiction over it, within the limits of their respective jurisdictions; and among the tribunals so within its restraining authority are the Ecclesiastical Courts. Of these, the Judicial Committee of the Privy Council, in its character of a court of appeal from these Courts, forms a part, and is therefore, as such—however high its position and authority in other instances—so long as it is exercising ecclesiastical jurisdiction, subject to our controlling jurisdiction by way of prohibition" (*t*).

In the Court of Appeal, Brett, L. J. said (*u*): "Whether in any case prohibition would lie to the Privy Council, or to any litigant or officer who should be about to execute an order made in council upon the advice of the members of the Judicial Committee, I think it is unnecessary to determine. It seems very difficult to say that it would lie. I am unwilling to say, without further argument, that it would not." Cotton, L.J. (*x*), also expressed himself as "not of opinion" that a prohibition could issue against the Judicial Committee. And Lord Coleridge said: "I am quite unable to accede to the position that the Judicial Committee of the Privy Council can be prohibited, in the exercise of its functions, by the judges of any portion of the Supreme Court" (*y*). Thesiger, L.J. (*z*), declined to express an opinion on the point, as it was not argued and it was unnecessary to do so; but a perusal of his judgment ★ leaves the impression that his [★ 431] opinion was the same as that of Lord Coleridge.

In the House of Lords neither Lord Selborne, Lord Cairns, or Lord Watson made any reference to the point; but Lord Blackburn, after remarking that when

(*s*) L. R. 3 Q. B. D. 730; 4 Q. B. D. 697; 6 App. Cas. 424.
(*t*) L. R. 3 Q. B. D. 747. See also *Ex parte* Smyth, 2 C. M. & R. 748.
(*u*) L. R. 4 Q. B. D. 755.
(*x*) Id. 741.
(*y*) Id., p. 783. See the reasoning on p. 784.
(*z*) Id., p. 722.

the appeal from the Ecclesiastical Courts was transferred to such a body as the Judicial Committee, it might have been thought that the restraining jurisdiction of the temporal Courts was no longer needed, added: "the Legislature has not thought fit to take away the prohibition to the Ecclesiastical Courts." And later in his judgment he remarked (*a*); "I think, if we can suppose such a thing, a sentence of the Judicial Committee imposing imprisonment or the pillory, would be such a novelty that the Court, in prohibition, would be justified in saying that it was wrong, and, disregarding its authority, to grand [*sic*] a prohibition" (*b*).

Courts to which prohibitions have issued.

Prohibitions have been issued to Ecclesiastical Courts of every kind (*c*); to Convocation (*d*); to the Palatine Courts (*e*); the Duchy Courts (*f*); the Vice-Chancellor's Court at the Universities; the Mayor's Court of the city of London (*g*); county courts (*h*); courts martial, naval and military (*i*); the Courts of the Stannaries (*k*); to the railway commissioners; to coroners (*l*); Quarter Sessions (*m*); justices; courts of request (*n*); and to the Salford Hundred Court (*o*).

[★432] ★ Prohibition was also held to lie to the following courts, now abolished or become obsolete: the Admiralty Court (*p*), even after 20 Vict. c. 65 had put

(*a*) L. R. 6 App. Cas. 452.

(*b*) In Gorham *v.* Bishop of Exeter, 15 Q. B. 52 (where the ground of application for a prohibition was that the Judicial Committee had not jurisdiction to hear an appeal from the Court of Arches), the application was for a prohibition to the Dean of the Arches and the Archbishop of Canterbury to prevent them carrying into execution the order of Her Majesty in Council made upon the report of the Judicial Committee.

(*c*) See *post*, pp. 463 *et seq.* (*d*) 4 Inst. 322.

(*e*) Fitton *v.* Richardson, Sty. 285; Vaudry *v.* Pannel, 3 Bulst. 116.

(*f*) Warner *v.* Suckerman, 3 Bulst. 119. See Anon., Skin. 43; Firebrass's case, 2 Salk. 550.

(*g*) See *post*, pp. 471 *et seq.*, and Blacquiere *v.* Hawkins, 1 Doug. 378.

(*h*) See *post*, pp. 475 *et seq.*

(*i*) *Per* Lord Loughborough, Grant *v.* Gould, 2 H. Bl. 100.

(*k*) Palmer *v.* Cornway, 2 Roll. 253; Anon., 3 Roll. 379.

(*l*) R. *v.* Herford, 3 E. & E. 115; 29 L. J. Q. B. 249.

(*m*) Pomfraye's case, Litt. Rep. 163. The point whether a prohibition would lie seems to have been left undecided in this case; but it may be considered settled by the decision of the Court in R. *v.* Herford, 3 E. & E. 115. See the language of Cockburn, C.J., p. 136.

(*n*) Roberts *v.* Humby, 3 M. & W. 120; Jewell *v.* Horwood, 1 Roll. 263.

(*o*) Farrow *v.* Hayne, 3 H. & C. 101.

(*p*) Merged in the High Court of Justice by the Judicature Act, 1873, s. 16.

it on the footing of the Superior Courts (*q*); the Court of the Chamberlain of Chester (*r*); the Court of the Marches of Wales (*s*); the Courts of the Cinque Ports (*t*); the Marshalsea Court (*u*); the Earl Marshal's Court (*x*); the Council of York (*y*); the Court of High Commission (*z*); the President and Council of the North (*a*).

The question whether a prohibition would lie to the Divorce Court, before its merger in the High Court of Justice, was considered, but not determined, in *Forster* v. *Forster* (*b*).

A prohibition may issue to a court exercising criminal jurisdiction as well as to a civil court. This was expressly so laid down, in language applicable to all courts, in *R.* v. *Herford* (*c*), a case dealing with a coroner's court. Lord Loughborough was of the same opinion as to naval and military courts martial (*d*); and as to Quarter Sessions, see the case of *R.* v. *Pomfraye* referred to *ante*, p. 431 (*e*).

And, *per* Holt, C.J. (*f*), a prohibition lies to a pretended court as well as to a real one.

As to judges of assize and the Central Criminal Court, see the remarks *ante*, pp. 294, 295, when dealing with mandamus.

The jurisdiction seems to have existed from the earliest times. ★ Glanville, who wrote about [★ 433] 31 Hen. 1, notices two instances of prohibitions to the Ecclesiastical Courts; and the remonstrances of the clergy, embodied in the *articuli cleri* of 51 Hen. 3, shew the frequency with which the jurisdiction was exercised.

(*q*) James *v.* London and South Western Railway Co., L. R. 7 Ex. 287.

(*r*) Mekins *v.* Minshaw, Vent. 212.

(*s*) Gibbs *v.* Cann, 1 Roll. 83; Pastoe's case, id. 190; Powell *v.* Harris, 1 Roll. 263; Anon., 2 Roll. 327.

(*t*) Ting *v.* Meriwether, 1 Sid. 355; Williams *v.* Lister, Hardre, 475. 18 & 19 Vict. c. 48, amended by 20 & 21 Vict. c. 1, abolished the legal and equitable jurisdiction of the Lord Warden.

(*u*) Abolished by 12 & 13 Vict. c. 101, s. 13.

(*x*) Russel's case, 4 Mod. 128. For an account of this ancient Court of Chivalry, now become obsolete, see 3 Bl. Com. 68; 3 Steph. Com. (10th ed.) 351, note (*u*).

(*y*) Baker *v.* Dickinson, 1 Bulst. 110.

(*z*) See 4 Inst. 333; and Parlor *v.* Butler, Moore, 460.

(*a*) See 4 Inst. 246. (*b*) 4 B. & S. 187; 32 L. J. Q. B. 312.

(*c*) 3 E. & E. 115, 136; 29 L. J. Q. B. 249.

(*d*) Vide *ante*, p. 431, note (*i*).

(*e*) See also Com. Dig. tit. Prohibition (F. 6), and 2 Inst. 600; Cf. Goulson *v.* Wainwright, 1 Sid. 374; and The Admiralty case, 12 Rep. 77, 78.

(*f*) Chambers *v.* Jennings, 2 Salk. 553.

Public bodies.

Various public bodies with definite powers have been called into existence by statute in recent times, and the question has arisen whether they can be made the subject of the prohibitory jurisdiction which the High Court exercises in reference to courts with limited powers.

Tithe Commissioners.—A prohibition was granted to prevent Tithe Commissioners making an award before the time fixed by the repealed statute 6 & 7 Wm. 4, c. 71, ss. 45, 50 (*g*); also to prevent them making an award, under the same Act, settling a dispute as to the boundaries of parishes (*h*).

Inclosure and Improvement Commissioners.—A prohibition was granted to prohibit the Inclosure Commissioners from further proceeding with an inclosure under 8 & 9 Vict. c. 118, where they had gone on a wrong principle in ascertaining whether or not the proper proportion of assents had been given to the proposed inclosure (*i*).

For a case relating to Improvement Commissioners, see *Re Birch* (*k*).

Irish Land Commission.—The Irish Land Commission created by 44 & 45 Vict. c. 49, would be prohibited if it dealt with a case not within its jurisdiction (*l*).

Local Government Board.—The point was also considered in a case relating to the Local Government Board; but the Court found it unnecessary to decide it. Brett, L.J., however, observed: "If this question had been fully argued, and we had come to a decision one way or the other, I should have been prepared to express the opinion of the Court; but I think we need not give a decision upon a point so important to all parties. I think I am entitled to say this, that my view of the [★ 434] power of prohibition at the present ★ day is that the Court should not be chary of exercising it; and that whenever the Legislature entrusts to any body of persons, other than to the superior courts, the power of imposing an obligation upon individuals, the Court ought to exercise, as widely as they can, the power of controlling those bodies of persons, if those persons

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(*g*) *Re* Crosby-upon-Eden, 13 Q. B. 761.

(*h*) *Re* Ystradgunlais Tithe Commutation, 8 Q. B. 32; cf. *Re* Appledon Tithe Commutation, 8 Q. B. 139.

(*i*) Church *v.* Inclosure Commissioners, 11 C. B. N. S. 664.

(*k*) 15 C. B. 743.

(*l*) *Re* Irish Land Commission, 14 Ir. L. R. Q. B. &c., Divisions, 80, see pp. 88, 93; cf. *Ex parte* Hutchinson, 12 Ir. L. R. Q. B. D. 79.

admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament" (*m*).

Railway Commissioners.—Soon after the creation of the railway commissioners—to whom the jurisdiction previously possessed by the Court of Common Pleas under the Railway and Canal Traffic Act, 1854, was transferred by 36 & 37 Vict. c. 48—prohibitions were, without any question as to the right to prohibit, issued to them, where they had made orders beyond their jurisdiction (*n*).

The right to prohibit was afterwards questioned in the Court of Appeal; but the Court were unanimously of opinion that there was power in the High Court to prohibit the Railway Commissioners (*o*).

Ancient writ of prohibition to restrain waste.

There was anciently a writ of prohibition of a peculiar kind (issuing out of Chancery but returnable in a Court of Common Law) granted, not to prevent an inferior Court exceeding its jurisdiction, but to restrain the commission of waste by churchmen. The writ was taken away by the Statute of Westminster 2, c. 14; but the case in Parliament of the Bishop of Durham in the 35 Edw. 1 (Rol. Parl. vol. i. p. 198, No. 46 (*p*)), is an instance of such a writ being issued subsequently to that statute; a case which, on being brought to light by Coke in 12 Jac. 1, led him and the other judges of the King's bench to hold that the writ still lay at Common Law against a churchman who committed waste, and that it might be granted on motion made by any man (*q*).

We also ★ find, in 15 Car. 2, a rule being [★ 435] granted for a prohibition to prevent a parson committing waste (*r*). But the Court of Common Pleas, in

(*m*) R. *v.* Local Government Board, L. R. 10 Q. B. D. 320, 321. Distinguish *Re* Local Government Board, *Ex parte* Kingstown Commissioners, 16 Ir. L. R. Q. B., &c., Divisions, 150, 157.

(*n*) See Toomer *v.* London, Chatham, & Dover Railway Co., L. R. 2 Ex. Div. 450; Warwick Canal Co. *v.* Birmingham Canal Co., L. R. 5 Ex. D. 1. See the other cases cited, *post*, pp. 483, 484.

(*o*) South Eastern Railway Co. *v.* Railway Commissioners, L. R. 6 Q. B. D. 586.

(*p*) There is a still earlier record of 3 Ed. 1, to be found in 2 Roll. Abr. 813, of a proceeding in the case of an abbot in the King's patronage to whom a writ of prohibition is directed.

(*q*) See Stockman *v.* Whither, 1 Roll. 86. In the report of the same case in 2 Bulst. p. 279, Coke says, "we will revive this proceeding," an expression leading to the inference that it had fallen into disuse. Coke appears to have been in error in thinking that the record of 35 Ed. 1 authorized the issue of the writ from the Court of King's Bench, the King's answer being "*Inhibeatur per breve de Cancellariâ*" (see *per* Eyre, C.J., in Jefferson *v.* Bishop of Durham, 1 Bos. & P. 125).

(*r*) Lord of Rutland *v.* Greene, 1 Keb. 557, referring to Lyford's case, 11 Rep. 49.

1797, disclaimed for itself the possession of any such jurisdiction (*s*); and the jurisdiction does not appear to have been asserted by any court since that date.

And more recently, when a prohibition was sought to restrain what might be an indictable nuisance, *i.e.*, to prevent the justices of a county from pulling down an old bridge before the new one was passable, the application was refused as unwarranted by modern practice (*t*).

(*s*) See Jefferson *v.* Bishop of Durham, 1 Bos. & P. 105.
(*t*) See R. *v.* Justices of Dorset, 15 East, 594, 600.

★ CHAPTER II. [★ 436]

GENERAL PRINCIPLES REGULATING THE JURISDICTION.

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General rule.

THE broad governing principle is that a prohibition lies where a subordinate tribunal has no jurisdiction at all to deal with the cause or matter before it; or where, in the progress of a cause within its jurisdiction, some point arises for decision which the inferior Court is incompetent to determine. But a prohibition will not lie where the inferior Court has jurisdiction to deal with the cause and with all matters necessarily arising therein, however erroneous its decision may be upon any point (*a*).

★ Where any part of an indivisible cause [★ 437] of action is outside the jurisdiction of the inferior

(*a*) "The misinterpretion of either the common or statute law, is a proceeding confessedly within the jurisdiction of those courts and, where they are bound to exercise their judgment upon the one or the other, seems to be rather a matter of error, to be redressed in the course of the appeal which the law has provided, than a ground for a prohibition."—Opinion of the judges delivered to the House of Lords by Eyre, C.J., in Home *v.* Camden, 2 H. Bl. 536.

Court, a prohibition will be granted (*b*). And the smallness of the claim in the court below will be no reason for refusing a prohibition (*c*).

Exception.

Like all other generalisations from decided cases, the broad proposition above enunciated must not be accepted without qualification. Exception has been made in some cases in which, though the jurisdiction of the inferior Court was undoubted, the injustice of the method of proceeding has been such as to induce the superior Court to intervene and prohibit it.

"By far the greater part of the instances in our books, in which prohibitions have issued, are cases of plain excess of jurisdiction. But some of the instances go beyond an excess of jurisdiction, and seem rather to fall under the head of wrong and injustice done to the party; by refusing him, in the course of a proceeding strictly within the jurisdiction, some benefit or advantage to which the common or statute law entitled him, perhaps in opposition to the civil or canon law, by which the general proceedings of these courts [of peculiar jurisdiction] are regulated" (*d*).

One large class of cases falling within this exception are those in which Courts acting by the rules of the civil law decide, on any temporal matter incidentally arising before them, in a manner different from that in which the Courts of Common Law would decide the same. In such cases, though the matter of the suit before the Court Christian or the Admiralty Court were clearly within the jurisdiction of such Court, and though the erroneous judgment might possibly have been corrected on appeal, prohibitions have from very early times been granted.

The statement of Blackstone to this effect (*e*) is, according to Lord Ellenborough (*f*), the fair result [★ 438] drawn from a great variety ★ of cases in which prohibitions have been granted, and where the Ecclesiastical Courts had most undoubtedly cognizance.

(*b*) Rowland *v.* Hockenhulle, 1 Lord Ray, 698.

(*c*) Worthington *v.* Jeffries, L. R. 10 C. P. 379; 44 L. J. C. P. 209.

(*d*) *Per* Eyre, C.J., 2 H. Bl. 535. See also *per* Lord Mansfield in Full *v.* Hutchins, Cowp. 422, and *per* Hale, C.J., Juxon *v.* Byron, 2 Lev. 64.

(*e*) 3 Com. c. 7. Com. Dig. Prohibition, c. 23, also states that a prohibition shall go if a suit in the Spiritual Court be determined contrary to the right at common law."

(*f*) See Gould *v.* Gapper, 5 East, 366. Patteson, J., said (Blunt *v.* Harwood, 8 A. & E. 619), that he could not understand the decision in this case; but he subsequently (Burder *v.* Veley, 12 A. & E. 264) expressed his full concurrence in it.

And, in the language of the same learned judge (*g*), this has been the doctrine of the judges, not only in the time of Lord Coke, when a considerable degree of jealousy subsisted between the Courts of Westminster Hall and those of ecclesiastical jurisdiction, but in the times of Lord Hale (*h*), Lord Holt (*i*), Pratt, C.J. (*k*), and Lord Mansfield (*l*); the last mentioned judge having particularly instanced the misconstruction of an Act of Parliament as a ground for prohibition (*m*).

Reason of exception.

The reason why an exception is made in the case of the Ecclesiastical Courts is, because the judges of those courts do not proceed according to the principles of the common law (*n*).

What is not ground for prohibition.

In the case of all other courts neither erroneous decision, nor improper reception or refusal of evidence, is ground for prohibition (*o*).

And where Ecclesiastical Courts proceed in a matter merely spiritual, then they may proceed in their own way, though it should be different from that of the common law; no prohibition lies (*p*).

There is an important distinction pointed out by Sir John ★ Leach, V.C. (*q*), between a want of [★439] jurisdiction as to the subject of the suit, which can never be acquired, and the want of jurisdiction as to the locality of the parties in the suit.

"If," said that learned judge, "it appears on the

(*g*) 5 East, 371, 372.

(*h*) In Juxon *v.* Byron, 2 Lev. 64 (though the prohibition was denied), Hale, C.J., and all the Court agreed that the Ecclesiastical Court should be prohibited if they proceeded to try an incident temporal matter otherwise than the common law would.

(*i*) Shotter *v.* Friend, 2 Salk. 547; Carth. 142; prohibition to stay a suit for a legacy, for refusing proof of payment by one witness only.

(*k*) Bustard *v.* Stukely, 2 Lev. 209; to stay a suit for a share of a legacy left to two jointly.

(*l*) Case of Market Bosworth, Lord Ray. 435 (as to existence of a custom).

(*m*) Fall *v.* Hutchins, 2 Cowp. 422. See also the language of Lord Loughborough (Brymer *v.* Atkins, 1 H. Bl. 193), in dealing with an application for a prohibition to the old Court of Lords Commissioners of Appeals from the Admiralty in prize causes; and the judgment of the Exchequer Chamber delivered by Tindal, C.J., in Veley *v.* Burder, 12 A. & E. 309–314.

(*n*) See *per* Coltman, J., *Ex parte* Rayner, 17 L. J. C. P. 16.

(*o*) *Re* Dunford, 12 Jur. 361; *Ex parte* Rayner, *ubi supra*. But in Breedon *v.* Gill (9 Will. 3), a prohibition issued to the Commissioners of Appeals in excise matters for admitting the depositions taken in writing before the Commissioners of Excise, the statute requiring that the commissioners should proceed "by the oath of witnesses or the confession of the parties." 5 Mod. 272.

(*p*) See *per cur.* Shotter *v.* Friend, 2 Salk. 547.

(*q*) Chichester *v.* Donegal, 6 Madd. 395.

record that the inferior court had never any jurisdiction on the subject, no proceeding in that court and no acquiescence of parties can ever maintain the judgment. But the want of jurisdiction may proceed, not from the nature of the subject, but because one of the parties is not locally within the jurisdiction of the special court; and although the Court then may have full jurisdiction of the subject, it has not jurisdiction over the party, in respect of the absence of that party from the local district." In the latter case, if the party served with the process of the court appears, not for the purpose of protesting against the jurisdiction, but of entering into the merits of the suit, he cannot afterwards obtain a prohibition (*r*).

In one case a prohibition was granted to a temporal court (the Chancery of the Duchy), to stay a suit against the chief ranger of Enfield Chase, for a discovery of what deer he had killed, and what timber, wood, &c., he had felled, and by what warrant, and to shew cause why his patent should not be repealed; the ground of prohibition being that a man should not be obliged to answer upon his oath what would make him forfeit his place, but it ought to be proved against him (*s*). The mode of objecting in more recent times would have been by demurrer to the bill, which the inferior Court would have had jurisdiction to decide; and the case cannot now be regarded as an authority.

Only judicial proceedings prohibited.

The proceedings to be prohibited must be of a judicial character.

A prohibition would not be granted in respect of any proceeding belonging to the executive government of the country (*t*).

And where the governing body of a university discommuned a horsedealer for giving credit beyond a prescribed amount to a person in *statu pupillari*, this was [★440] held not to be a judicial proceeding, ★ though the tradesman received a formal summons to attend before the Vice-Chancellor; and a prohibition was refused (*u*). "Discommuning," said Lord Campbell, "is only giving a caution to persons in *statu pupillari* not to deal with certain tradesmen. There is no proceeding in the Court of the Vice-Chancellor. We notice that

(*r*) 1b. See also Anon. (No. 4), 2 Show. 155, and Vanacre *v.* Spleen, Carth. 33. See also Gardner *v.* Booth, 2 Salk. 549; Smith *v.* Executors of Poyndreill, Cro. Car. 97, and Anon., 1 Vent. 61.

(*s*) Firebrass's case, 2 Salk. 550.

(*t*) See Chabot *v.* Morpeth, 15 Q. B. 446, 459.

(*u*) *Ex parte* Death, 18 Q. B. 647; 21 L. J, Q. B. 337.

Court, which is a very eminent one ; but here no summons to a court was issued ; nothing more was done than to give this horsedealer an opportunity of satisfying the Vice-Chancellor and heads of colleges that he had not pursued the course of conduct imputed to him."

In Ireland the same principle has been applied to a Local Government Board in holding a preliminary inquiry as to a contemplated local and personal act, and in making provisional orders in reference to it (*x*).

The opinion of Brett, L.J., in *R.* v. *Local Government Board* (*y*), *ante*, pp. 433, 434, was distinguished by Palles, C.B., as applicable to bodies "with power of imposing an obligation on individuals ;" whereas a provisional order did not impose an obligation on anyone, and had no validity until confirmed by Parliament.

Proceedings against foreign sovereigns.

The entertaining a suit against a foreign sovereign, or the issue of any process against one, is ground of prohibition to any Court to whose jurisdiction the foreign sovereign has not submitted himself ; and the prohibition will be granted not only where the foreign sovereign is explicitly sued as such, but also where the fact is made to appear to the superior Court from the nature of the case or from any proceeding in it (*z*).

For, in the words of Lord Campbell (*a*), "it is quite certain upon general principles, and upon the authority of the case of *The Duke of Brunswick* v. *The King of Hanover* (*b*), recently decided in the House of Lords, that an action cannot be maintained in any English court against a foreign potentate, for anything done or omitted to be done by him in his public capacity, as representative of the nation of which he is the head ; and that no English Court has ★ jurisdiction [★ 441] to entertain against him any complaints in that capacity. Redress for such complaints affecting a British subject is only to be obtained by the laws and tribunals of the country which the foreign potentate rules, or by the representations, remonstrances or acts of the British Government. To cite a foreign potentate in a municipal court for any complaint against him in his public capacity, is contrary to the law of nations, and an insult which he is entitled to resent" (*c*).

(*x*) *Re* Local Government Board, *Ex parte* Kingstown Commissioners, 16 Ir. L. Rep. Q. B., &c., Divisions, 150.

(*y*) L. R. 10 Q. B. D. 321.

(*z*) See Wadsworth *v.* Queen of Spain; De Haber *v.* Queen of Portugal, 17 Q. B. 171.

(*a*) Id. 206, 207.

(*b*) 2 H. L. Cas. 1.

(*c*) See the comments in this judgment (17 Q. B. pp. 210–213)

And the same doctrine applies to any proceeding *in rem* against any public property belonging to the foreign sovereign in that capacity, as, *e.g.*, a vessel of war (*d*).

The question as to a vessel not a ship of war was considered but not determined in the case of *The Charkieh* (*e*).

Where judge is interested.

A prohibition is also grantable where the judge of an inferior Court proceeds to try, by himself or by his deputy, a cause in which he is himself interested (*f*).

Effect of agreement to abstain from objecting.

Where the cause of action does not arise within the jurisdiction of the inferior Court, it has been said that no agreement of counsel to abstain from making the objection can alter the law of the land, which says that an inferior Court can only hold plea where the cause of action arises within the local limits to which its jurisdiction is by charter or custom confined (*g*). But this remark should be considered in connection with the observations as to the effect of acquiescence to be found *post*, p. 446 *et seq.*

Is the grant of a prohibition discretionary?

It may be doubted whether any legal question has ever given rise to so great a conflict of judicial opinion as the question—whether the grant of a prohibition is discretionary, or whether it is demandable of right. The authority of eminent judges can be cited in support of either view; and sometimes the authority of the same judge can be adduced in favour of both views.

The opinion expressed in Hobart's Reports (*h*), that [★ 442] it is in ★ the discretion of the Court to grant a prohibition, is denied by all the judges in two cases (*k*) in the 12 & 13 Car. 2. This is also, in the opinion of Cockburn, C.J. (*l*), the effect of the answer of the judges in the case of the *articuli cleri* of 3 Jac. 1 (2 Inst. 607), that "prohibitions are not to be granted of favour but of justice."

On the other hand, Holt, C.J. (*m*), and Hide,

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on the outlawry said to have been obtained in one case against the King of Spain.

(*d*) See the case of The Prince Frederick, referred to by Lord Campbell, 17 Q. B. 212.

(*e*) L. R. 8 Q. B. 197; 42 L. J. Q. B. 75.

(*f*) Bac. Abr. Prohib. K., Hutton *v.* Fowke, 1 Keb. 648; Anon., 1 Salk. 396. Cf. *Ex parte* Medwin and Hurst, 1 E. & B. 609.

(*g*) *Per* Lord Campbell, C.J., De Haber *v.* Queen of Portugal, 17 Q. B. 213, 214.

(*h*) Page 67.

(*k*) Woodward *v.* Bonithan, Sir T. Ray. 3; Serjeant Morton's case, 1 Sid. 65.

(*l*) Martin *v.* Mackonochie, L. R. 3 Q. B. D. 750.

(*m*) See Bishop of St. David's *v.* Lucy, Lord Ray. 543, 544; Clay *v.* Snelgrave, Lord Ray. 578; Wharton *v.* Pits, 2 Salk. 548.

C.J. (*n*), were of opinion that the issue of the writ is discretionary; Kelynge and Twisden, JJ., being of a contrary opinion (*o*).

Lord Mansfield (*p*) held that the Court was not bound to grant a prohibition to a party who had acquiesced in the proceedings of the Court below, except where the absence of jurisdiction was apparent on the face of those proceedings. And according to Jervis, C.J. (*q*), "a prohibition is not a matter of absolute right," Cresswell, J., in the same case, adding (*r*): "We are not bound to grant a prohibition *ex debito justitiæ*."

On the other hand, Lord Denman in one case (*s*) said: "If called upon, we are bound to issue our writ of prohibition as soon as we are duly informed that any court of inferior jurisdiction has committed such a fault as to found our authority to prohibit it." But the same learned judge, delivering the considered judgment of the Court in another case (*t*), laid down the rule, already stated by Lord Mansfield, that a prohibition would not be granted in case of acquiescence by the parties, unless the want of jurisdiction was apparent on the face of the proceedings; this doctrine being repeated in another considered judgment of the Court of Queen's Bench in his time (*u*).

There are *dicta* of Parke, B. (*x*), and of Martin, B. (*y*), against the ★ discretionary character [★ 443] of the jurisdiction to prohibit; and in the elaborate opinion of the judges delivered by Willes, J., to the House of Lords in *Mayor, &c., of London* v. *Cox* (*z*) the opinion of Holt, C.J., is said to be erroneous, and the first of the above-mentioned opinions of Lord Denman is adopted, the writ being said to be of right in this sense, that "upon application being made in proper time, upon sufficient materials, *by a party who has not by misconduct or laches lost his right*, its grant or refusal is not in the mere discretion of the Court." Yet the same learned judge, two pages after, cites with approval an opinion of Cockburn, C.J. (*a*), making a dis-

(*n*) Admiral *v.* Linsted, 1 Sid. 178. See also case of Hitchin, Comb. 148.
(*o*) Ford *v.* Welden, Sir T. Ray. 92.
(*p*) Buggin *v.* Bennett, 4 Burr. 2037.
(*q*) *Re* Birch, 15 C. B. 755. (*r*) Id. 756.
(*s*) Burder *v.* Veley, 12 A. & E. 263.
(*t*) Bodenham *v.* Ricketts, 6 N. & M. 176.
(*u*) Yates *v.* Palmer, 6 D. & L. 288.
(*x*) Knowles *v.* Holden, 24 L. J. Ex. 224.
(*y*) Jackson *v.* Beaumont, 11 Exch. 303.
(*z*) L. R. 2 E. & Ir. App. 278.
(*a*) *Re* Forster, 4 B. & S. 187.

tinction between the case of a mere stranger applying for a prohibition and that in which the application is made by a party to the suit; treating the issue of the writ in the latter case as of right and in the former as discretionary. Cockburn, C.J., had said: "I entirely concur in the proposition that although the Court will listen to a person who is a stranger and who interferes to point out that some other Court has exceeded its jurisdiction, whereby some wrong or grievance has been sustained, yet that is not *ex debito justitiæ*, but a matter upon which the Court may properly exercise its discretion; as distinguished from the case of a party aggrieved, who is entitled to relief *ex debito justitiæ* if he suffers from the usurpation of jurisdiction by another Court;"—to which Willes, J., after citing it, adds: "Such a discretion once exercised cannot be the subject of review in a court of error." It seems also to Blackburn, J. (*b*), that the distinction between a stranger and a party aggrieved, though not taken very distinctly in any of the previous cases, was "well founded on common sense." And in a subsequent case (*c*) Cockburn, C.J., said: "Another ground upon which this rule ought to be discharged is upon the distinction which was much relied on by my brother Blackburn as well as well as myself in *Forster* v. *Forster*, viz., that in the exercise of this jurisdiction by prohibition, the Court will not interfere on the application of a person who is a stranger and not in any way interested in the subject-matter of the suit," &c. Nevertheless, in a still later case (*d*), we find the late Chief Justice [★ 444] saying: "Wherever we have ★ jurisdiction to prohibit we are, in my opinion, bound to exercise it *ex debito justitiæ*, and not *ex gratiâ*, or as mere matter of discretion."

According to a judgment of Brett, Grove and Denman, JJ. (*e*), wherever the superior Court is clearly of opinion, both with reference to the facts and the law, that the inferior Court is exceeding its jurisdiction, it is equally bound to grant a prohibition whether the applicant for it is the defendant below or a stranger. This opinion was expressly dissented from by Jessel, M.R. (*f*), who held the grant of the writ to be discretionary, and

(*b*) 4 B & S. 203. (*c*) R. *v.* Twiss, L. R. 4 Q. B. 413.
(*d*) Martin *v.* Mackonochie, L. R. 3 Q. B. D. 749, 750.
(*e*) Worthington *v.* Jeffries, L. R. 10 C. P. 379.
(*f*) Chambers *v.* Green, L. R. 20 Eq. 552. The late Master of the Rolls considered the opinion of the judges in Mayor, &c., of London *v.* Cox (*ubi supra*) to be in favour of this view. See L. R. 20 Eq. 555.

the rule to be that "when both parties to an action wished the inferior Court to decide it, a stranger should not as a matter of course prevent it." Brett, J. however, in a subsequent case (*g*), adhered to his former view, which was thus expressed: "The authorities shew that the ground of decision, in considering whether prohibition is or is not to be granted, is not whether the individual suitor has or has not suffered damage, but is whether the royal prerogative has been encroached upon, by reason of the prescribed order of administration of justice having been disobeyed. If this were not so it seems difficult to understand why a stranger may interfere at all. If this be so, on what principle can there be any distinction in the action of the superior Court dependent upon the *means by which or the persons by whom it is informed of the breach of order*, which is a breach of the prerogative? If it is the absolute duty of the superior Court to enforce order, on being convinced of a breach of it by information given by the defendant in the suit below, why should it be a less absolute duty if it is convinced of the same breach of order by information given by a stranger? Order is no less broken; the prerogative is no less invaded . . . The real ground of the interference by prohibition is not that the defendant below is individually damaged, but that the cause is drawn in *aliud examen;* that public order or administration of law is broken. And inasmuch as the duty of enforcing such order is imposed on the superior Courts, and the issue of a writ of prohibition is the means given to them ★ by law of enforcing such order, it seems [★ 445] to me that, upon principle and in the absence of enactment, it must be their duty to issue such writ whenever they are clearly convinced by legal evidence, by *whomsoever brought before them*, that an inferior Court is acting without jurisdiction, or is exceeding its jurisdiction" (*h*).

It is impossible to withstand the cogency of this reasoning, or to deny the conclusion deduced from it, if the historic doctrine on which it is based be still regarded as the true foundation and real reason of the jurisdiction in prohibition, as it is now exercised. If the real reason for the interposition of the High Court, nowadays, be, not to protect the subject from being harassed by the exercise *in invitum* of an unwarranted jurisdiction, but to prevent any encroachment on the royal pre-

(*g*) Ellis *v.* Fleming, L. R. 2 C. P. D. 240.
(*h*) Worthington *v.* Jeffries, L. R. 10 C. P. 382, 383.

rogative (which, no doubt, is the language of the old cases), then it must follow that on being informed by anybody at any time—and notwithstanding any acquiescence, laches, or misconduct of the parties—of an excess of jurisdiction on the part of a subordinate tribunal, the High Court is bound to intervene on behalf of the prerogative of the Crown. Though, in the language of Lord Mansfield (*i*), the defendant should "lie by and suffer the inferior court to go on under an apparent jurisdiction," no obstacle should be interposed by the High Court to his informing it of something, not apparent on the face of the proceedings in the court below, which ousted its jurisdiction. It would be absurd for the Court to say—"though we regard only the invasion of the royal prerogative, we will not allow the Crown the benefit of anybody's testimony who was a consenting party to the wrongful act." Further, if the view of the present Master of the Rolls be correct, no party could by the "misconduct or laches" referred to in the opinion of the judges in *Mayor, &c., of London* v. *Cox*, be properly said to lose what is there called his "right" to a prohibition.

Grant of writ not obligatory in every case of excess of jurisdiction.

In truth, as in the case of other doctrines of our law, founded originally on some theoretic basis which time robs of its importance, whilst the doctrines themselves remain of value for some wholly different reason, the original groundwork of the jurisdiction in prohibition has undergone modification by the decisions of recent [★ 446] times. ★ The Courts have ceased to look solely to the necessity of guarding the royal prerogative from encroachment, and have had regard rather to the right of the subject to be protected from the process of inferior Courts in matters out of their province. It is from this point of view only that any person can be said to have a "right" to a prohibition, or that laches, acquiesence, or misconduct can be said to disentitle him to the aid of the superior Court; language wholly inappropriate, and considerations wholly irrelevant, if the matter is viewed solely from the point of view of the Crown and its rights (*k*).

It is submitted that the weight of authority and of

(*i*) Buggin *v.* Bennett, 4 Burr. 2037.

(*k*) Further, if the prerogative of the Crown is alone regarded, there is no reason why the Court should refuse to hear a second application for a prohibition on better affidavits. See Bodenham *v.* Ricketts, 6 N. & M. 537, where it was strongly, but in vain argued that the Court was bound *ex debito justitiæ* to grant a prohibition whenever it was made to appear before it that an inferior court was proceeding in a matter out of its jurisdiction.

reason is in favour of the view that the granting of a prohibition is not obligatory upon the Court in every case where a subordinate tribunal deals with a matter out of its jurisdiction; and that, where the absence or excess of jurisdiction is not apparent on the face of the proceedings in the Court below, no party who has acquiesced in those proceedings can obtain a prohibition from the superior Court: the reason why, notwithstanding such acquiescence, a prohibition is granted where the want of jurisdiction is apparent on the face of the proceedings being, according to Lord Denman (*l*), for the sake of the public, lest "the case might be a precedent, if allowed to stand without impeachment" (*m*).

That the effect of acquiescence is such as is here stated is clearly laid down in many cases.

Effect of acquiescence.

Acquiescence in the jurisdiction exercised by the subordinate tribunal will not disentitle the party acquiescing to a prohibition, where it is apparent on the face of the proceedings that that tribunal had not jurisdiction; in other words, where the defect of jurisdiction is patent. But if the want of jurisdiction does not appear on the face of the proceedings, in other words if the defect ★of jurisdiction is latent, then [★ 447] acquiescence will preclude the party who acquiesced from shewing such want of jurisdiction *aliunde*.

"If," said Lord Mansfield (*n*), "it appears upon the face of the proceedings that the Court below have no jurisdiction, a prohibition may issue at any time, either before or after sentence, because all is a nullity: it is *coram non judice*. But where it does not appear upon the face of the proceedings, if the defendant below will lie by and suffer that court to go on, under an apparent jurisdiction, it would be unreasonable that this party, who, when defendant below, has thus lain by and concealed from the Court below a collateral matter, should come hither after sentence against him there, and suggest that collateral matter as a cause of prohibition, and obtain a prohibition upon it, after all this acquiescence in the jurisdiction of the Court below" (*o*).

(*l*) 6 N. & M. 176.

(*m*) That the issue of the writ is not in all cases obligatory is also the view taken by the American courts. See High's Extraordinary Remedies, p. 606, and cases there referred to.

(*n*) Buggin *v.* Bennett, 4 Burr. 2037. See also Mendyke *v.* Stint, 2 Mod. 272; Clerk *v.* Andrews, 1 Show. 10; Jones *v.* James, 19 L. J. Q. B. 257; Winsor *v.* Dunford, 18 L. J. Q. B. 14; and *per* Abbott, C.J., in *Ex parte* Cowan, 3 B. & A. 129, cited *post*, p. 459.

(*o*) See also Roberts *v.* Humby, 3 M. & W. pp. 122, 127. "If

So in Comyns' Dig. tit. Prohibition (D.) it is said: "but generally after an appeal, a prohibition shall not be allowed, if the matter be not apparent; for by that the party affirms the jurisdiction," referring to 2 Rol. 319, l. 10.

And in the considered judgment of the Court of Queen's Bench in *Yates* v. *Palmer* (*p*), we find it laid down that "if a party makes no objection to the jurisdiction of the Court whilst the case is proceeding, apparently acquiesces in the jurisdiction, and suffers the Court to act without protest or objection, as if it had jurisdiction, down to actual payment of damages and costs, it is too late for a prohibition, even though he had no opportunity to apply to the superior court earlier; unless the defect appears upon the face of the proceedings;" and on this ground the rule for a prohibition was discharged with costs.

And in the considered judgment in *Bodenham* v. *Rick-* [★ 448] *etts* (*q*) ★ delivered by Lord Denman, we find the law thus stated: "There is no doubt that in the case of prohibition to be granted for the sake of trial (as distinguished from those which are to be granted upon account of a wrong trial or erroneous judgment), the rule is established—that a party neglecting to contest the jurisdiction in the first instance, and taking his chance of a favourable decree, shall not be allowed after sentence, to allege the want of jurisdiction as a ground of prohibition, unless the defect appear on the face of the pleadings. The justice of the rule is very apparent, the propriety of the exception scarcely less so; for it is the duty of this Court to restrain any encroachment of jurisdiction on the part of the inferior court; and therefore it interferes for the sake of the public, and not of the individual where, from the want of jurisdiction appearing on the face of the proceedings, the case might become a precedent, if allowed to stand without impeachment."

Although acquiescence, where there is not jurisdiction, cannot confer it (*r*), and the jurisdiction to grant a prohibition in respect of the right of the Crown is

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the defect be of power to try the particular issue only (*defectus triationis*, as it is called), the right to move for a prohibition [after sentence] is gone. If the defect be of jurisdiction over the cause (*defectus jurisdictionis*), and that defect be apparent upon the proceedings, a prohibition goes after sentence" (*per* Willes, J., Mayor, &c., of London *v.* Cox, L. R. 2 E. & I. App. 282).

(*p*) 6 D. & L. 288.

(*q*) 6 N. & M. 176.

(*r*) Knowles *v.* Holden, 24 L. J. Ex. 223.

not taken away, yet, considering the conduct of the applicant, the importance of making an end of litigation, and that the writ, though of right, is not of course, the Court would decline to interpose; except perhaps upon an irresistible case, and an excuse for the delay, such as disability, malpractice, or matter newly come to the knowledge of the applicant (*s*).

The distinction between a patent and a latent want of jurisdiction does not apply to the county courts. The proceedings there do not shew the matter in any formal way; the excess of jurisdiction may depend only on the defence set up orally by the defendant, and may appear only in the course of the trial; and judgment may follow almost as soon as the defence is understood. Under such circumstances there would be no opportunity of moving for a prohibition before judgment; and, unless the motion was allowed after judgment, the excess of jurisdiction would be without redress (*t*).

In cases of this kind where the defendant objects in the inferior Court to its jurisdiction, this, on application for a prohibition, is the ★ same as if the [★ 449] want of jurisdiction appeared on the face of the preceedings (*u*).

Where both parties to a county court plaint appeared before the judge and consented to a reference, in the course of which the defendant objected to the jurisdiction of the arbitrators on the ground that title to land came in question, but the arbitrators proceeded, under protest from the defendant, and made their award, the defendant was held not to have disentitled himself to a prohibition by consenting to refer the matter (*x*).

And, in one case, a party who had objected in the court below to its jurisdiction was held not to have acquiesced in it, or waived his right to a prohibition, by obtaining from the judge the statement of a case for the opinion of a superior court (*y*).

Not granted *quia timet.*

A prohibition will not be granted *quia timet:* there must be some suit or matter depending; and the writ will not be granted against a person not actually a party to the suit at the time, though it may be open to him to join in it at any time (*z*).

(*s*) *Per* Willes, J., Mayor, &c., of London *v.* Cox, L. R. 2 E. & I. App. 283, referring to the Case of the Admiralty, 12 Rep. 77.

(*t*) *Per* Coleridge, J., Marsden *v.* Wardle, 3 E. & B. 695; 23 L. J. Q. B. 263. See Pears *v.* Williams, 2 L. M. & P. 515.

(*u*) Denton *v.* Marshall, 1 H. & C. 660.

(*x*) Knowles *v.* Holden, 24 L. J. Ex. 223.

(*y*) Jackson *v.* Beaumont, 11 Ex. 300; 24 L. J. Ex. 301.

(*z*) Hill *v.* Bird, Aleyn. 56.

How soon prohibition may be granted.

But once a proceeding has in fact been instituted before any subordinate tribunal, the prohibitory jurisdiction of the Court may be invoked and exercised, at any time before judgment, and in some cases after judgment, and even after execution.

"Prohibitions," says Coke (*a*), "by law are to be granted at any time to restrain a Court to intermeddle with or execute anything which by law they ought not to hold plea of. . . . And the King's Courts that may award prohibitions being informed either by the parties themselves or by any stranger that any court, temporal or ecclesiastical, doth hold plea of that whereof they have not jurisdiction, may lawfully prohibit the same, as well after judgment and execution as before."

Substance, not form, required.

In determining whether an action in the inferior court is within its jurisdiction, the High Court will regard the substance of the action, and not feel bound by its form or by the mere phraseology of the pleadings in the court below (*b*). And, ★ according to Hawkins, J. (*c*), the Court will look beyond the evidence actually adduced in the court below, which may have been insufficient to shew a jurisdiction, where additional evidence, if given, would have brought the case within the jurisdiction. [★ 450]

Where an amendment of the pleading in the court below would cure the defect of jurisdiction, and it is shewn that an assent to such amendment being made has been given, an order for a prohibition would be refused; or, if granted, would be enlarged to give an opportunity for the amendment being made (*d*).

Where jurisdiction depends on contested facts.

If the existence or non-existence of jurisdiction depends on contested facts which the inferior tribunal is competent to inquire into and determine, a prohibition will not be granted; though the superior Court should be of opinion that the questions of fact have been wrongly determined by the Court below, and if rightly determined would have ousted the jurisdiction (*e*); unless the High Court is of opinion that the judge below has perversely so decided, and has not honestly and fairly exercised his judgment upon the evidence before

(*a*) 2 Inst. 602.

(*b*) See, for example, Jones *v.* Currey, 2 L. M. & P. 474, *post*, p. 479; Hunt *v.* North Staffordshire Railway Co., 2 H. & N. 451.

(*c*) Heyworth *v.* Mayor, &c., of London, 1 Cab. & E. 312.

(*d*) Blunt *v.* Harwood, 8 A. & E. 619.

(*e*) Joseph *v.* Henry, 1 L. M. & P. 388; 19 L. J. Q. B. 369; Brown *v.* Cocking, 9 B. & S. 503.

him (*f*); or unless he proceeds on a wrong principle of law in arriving at his determination of the facts (*g*).

The finding of the judge is, though not absolutely yet practically conclusive, in the absence of very peculiar circumstances (*h*).

Where, however, the jurisdiction of quarter sessions depended on the question whether six days were or were not a reasonable time for the appellants to make up their minds whether they would appeal or not, it was held that it was competent for the High Court to review the decision of quarter sessions on this question [of fact]; and, disagreeing with such decision, the Court granted a prohibition (*i*). The decision in *Elstone* v. *Rose* (*j*) was considered exactly in point, though the error of the judge in that case consisted in applying a wrong rule of law to the facts (*k*).

★ And if, upon the record stating the facts, [★ 451] it be admitted that the judge below has wrongly decided on the fact on which his jurisdiction depends, so that the High Court can see undoubtingly that he had not jurisdiction, a prohibition will be granted (*l*).

Jurisdiction depending on a doubtful point.

Where the question of jurisdiction or no jurisdiction depended on a doubtful point of international law, which the Court sought to be prohibited was peculiarly fitted to decide, a prohibition was refused (*m*).

In a previous case, the Court of Queen's Bench refused a prohibition on the ground that the question of jurisdiction was doubtful, and might be more rapidly and cheaply tried by an action (*n*).

Where point out of jurisdiction is immaterial.

And if the point beyond the jurisdiction is one wholly immaterial to the question to be determined in the cause, a prohibition will not be granted (*o*).

A prohibition was refused in a case relating to a faculty for an organ where the whole suit in the court

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(*f*) See *per* Cockburn, C.J., Elstone *v.* Rose, 9 B. & S. 513; L. R. 4 Q. B. 4.

(*g*) Ib. (*h*) Ib.

(*i*) Liverpool, &c. *v.* Everton, L. R. 6 C. P. 414; 40 L. J. M. C. 104; 23 L. T. N. S. 813.

(*j*) *Ubi supra.* (*k*) See the judgment of Blackburn, J.

(*l*) Thomson *v.* Ingham, 1 L. M. & P. 216. The above is the effect of this decision, as stated by Coleridge, J., in Joseph *v.* Henry (*ubi supra*). But in truth the decision goes much further, and lays down also the proposition that where a County Court Judge wrongly decides that title to land is not in question, his decision on the point is not conclusive, and a prohibition may be granted.

(*m*) The Charkieh, L. R. 8 Q. B. 197; 42 L. J. Q. B. 75.

(*n*) *Re* Birch, 15 C. B. 743.

(*o*) See *per cur.* Rutland *v.* Bagshawe, 14 Q. B. 889.

below was nugatory, and the prohibition would "not be material" (*p*).

Statutory bar to prohibition.

If a statute regulating the procedure in a local court enacts that "no defendant shall be permitted to object to the jurisdiction of the Court by any proceeding whatsoever, except by plea," it has been held that a defendant is deprived of the right, which he would otherwise have, of moving for a probibition on the ground of want of jurisdiction (*q*). *A fortiori*, if the statute goes on to provide that "if the want of jurisdiction be not so pleaded, the Court shall have jurisdiction for all purposes" (*r*).

Judicature Act, 1873, ss. 89, 90.

The competency of inferior Courts has been much enlarged by sects. 89 & 90 of the Judicature Act, 1873. [★ 452] ★ By sect. 89, "every inferior court which now has or which may after the passing of this Act have jurisdiction in equity, or at law and in equity, and in Admiralty respectively, shall, as regards all causes of action within its jurisdiction for the time being, have power to grant, and shall grant in any proceeding before such Court, such relief, redress, or remedy, or combination of remedies, either absolute or conditional, and shall in every such proceeding give such and the like effect to every ground of defence or counterclaim, equitable or legal (subject to the provision next hereinafter contained,) in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice."

Sect. 90 enacts that, "Where in any proceeding before any such inferior court any defence or counterclaim of the defendant involves matter beyond the jurisdiction of the Court, such defence or counterclaim shall not affect the competence or the duty of the Court to dispose of the whole matter in controversy so far as relates to the demand of the plaintiff and the defence thereto; but no relief exceeding that which the Court has jurisdiction to administer shall be given to the defendant upon any such counterclaim: Provided always, that in such case it shall be lawful for the High Court, or any division or judge thereof, if it shall be thought fit, on the application of any party to the proceeding, to order that the whole proceeding be transferred from

(*p*) Butterworth *v.* Walker, 3 Burr. 1689.

(*q*) Manning *v.* Farquharson, 30 L. J. Q. B. 22. But see the observations on this case in Mayor, &c., of London *v.* Cox, L. R. 2 E. & I. App. 259.

(*r*) Chadwick *v.* Ball, L. R. 14 Q. B. D. 855, overruling Oram *v.* Brearey, L. R. 2 Ex. D. 346, cases relating to the Salford Hundred Court of Record.

such inferior court to the High Court, or to any division thereof," &c.

This has been interpreted to mean that the inferior court may deal with any counterclaim which, if it were an original claim, would be beyond its jurisdiction, to the extent of answering the claim of the plaintiff, but not further. As soon as judgment is obtained by the defendant on his counterclaim of sufficient amount to equal the claim of the plaintiff, then, if the counterclaim is beyond the jurisdiction of the inferior court, that court is to hold its hand; as regards the overplus of the counterclaim, that must be dealt with by some other court (*s*).

Partial prohibition.

A prohibition may be partial only as to the proceeding in the court below.

"If a suit be in the Spiritual Court for a matter within their cognizance, mixed with matter of which the Court has no ★ jurisdiction, a prohibi- [★ 453] tion shall go *quoad* the part of which it has no jurisdiction" (*t*).

A prohibition was granted to a county court to stay the proceedings in an action before it, so far as they related to a breach of contract not within its jurisdiction, leaving it open to the plaintiff to proceed on amended particulars for a breach of the contract which the county court had jurisdiction to deal with (*u*); also to restrain an action for the recovery of lands so far as they were freehold, but not so far as they were leasehold, where the title to the former only could be questioned (*x*).

When prohibition absolute and when only *quousque*.

A prohibition may be absolute, or only until some act be done. In the former case it ties up the inferior jurisdiction until the writ is set aside or a consultation is issued; in the latter case the doing of the act *ipso facto* discharges the prohibition (*y*): *e.g.*, a prohibition to an Ecclesiastical Court until it should give a copy of the libel (*z*).

(*s*) Davis *v.* Flagstaff Mining Co., L. R. 3 C. P. D. 228, 237, 242.

(*t*) Com. Dig. Prohibition, F. 17, referring to Betsworth *v.* Betsworth, Sty. 10; Lush *v.* Webb, 1 Sid. 251. See also Townsend *v.* Thorpe, 2 Ld. Ray. 1507; Middleton *v.* Croft, Cas. t. Hard. 395; Owen's case, 2 Show. 195; *per cur.* Pense *v.* Prouse, 1 Ld. Ray. 59. See also South Eastern Railway Co. *v.* Railway Commissioners, L. R. 6 Q. B. D. 586; Free *v.* Burgoyne, 5 B. & C. 400.

(*u*) Walsh *v.* Ionides, 22 L. J. Q. B. 137.

(*x*) Kerkin *v.* Kerkin, 3 E. & B. 399.

(*y*) Bac. Abr. Prohibition (F).

(*z*) Anon., 6 Mod. 308; cf. Anon., 1 Ld. Ray. 442.

Time for application.

The application may be made as soon as an issue is raised which it is beyond the province of the tribunal of limited jurisdiction to determine. Until the point is in issue, on the pleadings (if there be pleadings), or otherwise, there is not, strictly, ground for a prohibition; as, though pleaded, it may happen to be admitted, and then there will be no question to try beyond the jurisdiction (*a*).

But where it is clear to the High Court that the parties are in progress to have the point determined, a prohibition may be granted without waiting for a formal joinder of issue (*b*). A prohibition was granted as soon as it appeared that the parties were about to try the existence in the Ecclesiastical Court of a prescriptive right to seats in the body of a parish church (*c*).

A prohibition was granted to an Ecclesiastical Court [★ 454] of appeal ★ in a case where an issue as to the existence of a modus had ousted the jurisdiction, even after it had remitted the suit to the court below and awarded costs against the appellant, and though the application for a prohibition was by the party who had appealed (*d*).

It was also granted after sentence on a dean, admonishing him not to exercise the functions of his office on pain of the greater excommunication; and the Court has sometimes enjoined revocation of a sentence pronounced by an Ecclesiastical Court (*e*).

Sometimes the application for a prohibition cannot be made before sentence (*f*). The cases (*g*) in which the application for a prohibition has been held too late after sentence (the defect of jurisdiction not being apparent on the face of the proceedings) must be understood of cases where the applicant has appeared in the court below and made no objection there (*h*). They have no application to the case of a continuing sentence which may end in something of a severer kind;

(*a*) See Tinniswood *v.* Pattison, 3 C. B. 243; Dutens *v.* Robson, 1 H. Bl. 100.

(*b*) See *per* Bayley, J., Byerley *v.* Windus, 5 B. & C. 23, 24.

(*c*) Ib.

(*d*) Darby *v.* Cozens, 5 T. R. 552; Whitford *v.* Wilson, cited id. 556.

(*e*) See judgment in *Re* Dean of York, 2 Q. B. 40.

(*f*) Ib., *per* Lord Denman.

(*g*) Such as Chickham *v.* Dickson, 12 Mod. 132; Pool *v.* Gardner, 12 Mod. 207.

(*h*) See Serjeant *v.* Dale, L. R. 2 Q. B. 557.

e.g., a sequestration of the profits of a living, which might ultimately end in deprivation (*i*).

A prohibition would be granted after seizure of goods in execution; but not after the money recovered had been paid over by the one party to the other; as, no further step remaining to be taken, there would be nothing to prohibit (*k*).

The argument that nothing remains to prohibit requires, according to Lord Denman (*l*), to be narrowly watched, as it would give effect to unlawful proceedings merely because they were brought to a conclusion. And, according to another learned judge (*m*), "if it appears that the Court had no jurisdiction, the objection can never be too late."

Wherever an inferior tribunal takes any step in a cause over which it has no jurisdiction, a prohibition may be applied for at once. But if the matter is one which the inferior Court has ★ jurisdiction [★ 455] to deal with, a prohibition cannot be obtained till some point is raised by the pleadings, or otherwise, which that Court has no jurisdiction to try (*n*).

Where the want or excess of jurisdiction does not appear on the pleadings, *e.g.*, in the county courts and other inferior courts where there are no pleadings, the application cannot be made until something arises which ousts the jurisdiction.

When exception must first be taken in court below.

The question whether the applicant for a prohibition must first take exception in the court below to the exercise of its jurisdiction was fully considered in the elaborate opinion of the judges in *Mayor, &c., of London* v. *Cox* (*o*), delivered by Willes, J., to the House of Lords, where most of the learning on the subject will be found.

In that case it was objected that the garnishee could not apply for a prohibition before he had pleaded to the jurisdiction of the mayor's court (*p*); the question for decision being, in effect, whether, if a party, entitled to

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(*i*) Ib. According to the opinion of all the judges in the *articuli cleri* case (3 Jas. 1), a prohibition may go as well after judgment and execution as before.

(*k*) Kimpton *v.* Willey, 9 C. B. 719; Denton *v.* Marshall, 1 H. & C. 654.

(*l*) 2 Q. B. 40.

(*m*) Abbott, C.J., in *Ex parte* Williams, 4 B. & C. 314.

(*n*) Mayor, &c., of London *v.* Cox, L. R. 2 E. & I. Ap. 239.

(*o*) *Ubi supra.*

(*p*) By s. 15 of 20 & 21 Vict. c. clvii. it is enacted, with reference to the Mayor's Court, that "no defendant shall object to the jurisdiction of the Court, in or by any proceeding whatever, except by plea."

plead in the Court below, move for a prohibition instead, it is competent for the Court to grant his application?

The answer depends upon this—whether the inferior tribunal is incompetent to deal with the matter at all; or whether it has jurisdiction over the case, but something arises in the course of it with which the inferior tribunal is incompetent to deal. In the former case a plea in the court below is not a necessary preliminary to applying for a prohibition; in the latter case it is, except where the superior Court judicially knows that such a plea would not be allowed by the Court below.

"There are exceptions which from their very nature must be first raised in the court below. These occur (1) in cases where there is jurisdiction over the subject-matter, and in which, therefore, prohibition will not go for mere irregularity in the proceedings, or even a wrong decision of the merits (*Blaguiere* v. *Hawkins* (*q*)); but in which it will be granted for a denial or perversion of right, such for instance as refusal of a copy of the libel, in which [★456] case ★ the prohibition is only *quousque*; or refusal of a valid plea to a subject-matter of complaint within the jurisdiction; in which case, although if the plea had been received, it might have been tried in the court below, yet if it be refused, then upon its validity and truth being established in the court above, the prohibition is absolute; *White* v. *Steele* (*r*). In these cases there is entire jurisdiction over the subject-matter. (2) Another class in which the exception must first be taken in the court below is that in which there is general jurisdiction over the subject-matter, but a defence is raised which the court is incompetent to try; as where in a suit to repair a chancel the impropriator pleads a custom for the parish to repair, or raises a question of parish or no parish, which must be tried by a jury: see *Duke of Rutland* v. *Bagshawe* (*s*). In such a case the prohibition goes so soon as it appears that the special Court cannot proceed without trying the custom, or taking a step towards trying it, even though it be not yet in issue, or a plea thereof refused; *French* v. *Trask* (*t*), *Byerley* v. *Windus* (*u*). And in this class of cases the prohibition acts simply in aid of the special or inferior Court, by trying what that Court had no jurisdiction to try; and upon an affirmative decision, the prohibition is absolute; but upon a negative decision, there is a judgment of consultation, upon which the special or inferior Court proceeds with the case unhampered by the objec-

(*q*) 1 Doug. 378. (*r*) 12 C. B. N. S. 383.
(*s*) 14 Q. B. 869. (*t*) 10 East, 348. (*u*) 5 B. & C. 1.

tion. The *Bishop of Winchester's* case (*x*) was of an intermediate class," where it was held, "that as the Court *well knew* (that is to say, had judicial knowledge) that the Ecclesiastical Courts would not allow such a plea [that of a custom *in non decimando* by a layman], the traverse of the refusal of the plea was immaterial. . . . But whatever be the true conclusion upon this, the reasoning is unanswerable, that if it appears judicially to the prohibiting Court that the special or inferior Court will not allow the plea, the prohibition shall go without the idle ceremony of tendering there a plea which is sure to be rejected" (*y*).

Application premature.

The application for a prohibition may sometimes be made too soon.

★ Where proceedings are pending before [★ 457] an inferior Court, having reference to several distinct things, one or more of which is within the cognizance or competence of that Court and others are not, the High Court will not assume that the inferior Court will go beyond its competency and jurisdiction, and will not interfere before the inferior Court has done something in excess of its jurisdiction (*z*).

Where matters triable at common law arise incidentally in a cause before the Ecclesiastical Court, and that Court has jurisdiction in the principal point, a prohibition will not be granted to *stay trial* (*a*).

Neither, according to Lord Ellenborough, can a prohibition, in such a case, go before sentence; for till sentence be given the courts of common law have no reason to suppose that the Ecclesiastical Court will determine wrong (*b*).

Where the faculty prayed for in the Arches Court of Canterbury was for confirming alterations made in a parish church, and secondly for appropriating certain extensions made to the members of a university, and the suit was at issue in the Arches Court, a prohibition was refused; because the granting a faculty as to alterations in a church and as to the distribution of seats in general was clearly matter of ecclesiastical cognizance; and the objection against granting a faculty to a man and his heirs, or to persons claiming pews, otherwise than by prescription, in respect of houses out of the

(*x*) 2 Rep. 43 a; Cro. Eliz. 511.
(*y*) *Per* Willes, J. 2 E. & 1 App. 276, 277.
(*z*) See per Cockburn, C.J., R. *v.* Twiss, L. R. 4 Q. B. 413.
(*a*) *Per* Lord Mansfield, Full *v.* Hutchins, 2 Cowp. 424.
(*b*) Gould *v.* Gapper, 5 East, 364.

parish, was premature (*c*). "The Court," said Lord Denman, C. J., "has no power to prohibit the Ecclesiastical Court from granting a faculty to confirm the alterations which have been made: the suit, therefore, must proceed *quoad* them, in order that the Ecclesiastical Court, within whose proper jurisdiction that matter is, may determine whether the faculty shall be granted or not. With respect to the other object of the faculty; assuming for the sake of the argument that the extension cannot be legally appropriated as prayed, and also assuming that a prohibition will lie in respect of an application *ex gratiâ* for a faculty *before* it is granted (which is by no means a clear point), still we [★ 458] are not to presume that the ★ Ecclesiastical Court will not take care to limit the faculty (if any be granted) to those objects which may legally be embraced in it."

This decision was followed in *R.* v. *Twiss* (*d*), where the faculty asked for was to enable poor law guardians to erect on consecrated ground a chapel for the inmates of the workhouse, and also buildings connected with the workhouse. A prohibition applied for, before sentence in the Consistory Court, was refused; because, though the erection of buildings other than the chapel was a purpose for which the faculty could not be granted, yet it might be granted for the building of the chapel, and the Court would not presume that the inferior Court would exceed its jurisdiction; and if the inferior Court did so, there was nothing to prevent a fresh application being made after the faculty should be granted.

Where a plaint was issued in a county court by a friendly society to enforce payment of a sum found, by an arbitrator, to be due to the society from a member, an application for a prohibition, on the ground that the matter was one which could not be settled by arbitration, was held to be premature, as the court below was the proper tribunal to try that question in the first instance (*e*).

Application too late.

On the other hand, the application may be made too late.

If the applicant delays moving till after the judgment of the court below has been satisfied, *e.g.*, by the payment over of the amount of the judgment to the

(*c*) Hallack *v.* University of Cambridge, 1 Q. B. 593, distinguishing Byerley *v.* Windus, 5 B. & C. 1.
(*d*) L. R. 4 Q. B. 407.
(*e*) Skipton, &c., Society *v.* Prince, 33 L. J. Q. B. 323.

plaintiff by the defendant, the application for a prohibition will be held too late; for, as no further step remains to be taken by the court below or by either of the parties, there is nothing to prohibit (*f*).

But an application before sale, though after seizure under an execution, would not be considered too late (*g*).

Where the sentence of a court martial has been carried into effect by the sovereign dismissing from the army the person found guilty, it was held that there was nothing and nobody to prohibit. The court martial ceased to exist as soon as its sentence was pronounced: to the Judge Advocate no other duty belonged than that of transmitting the sentence for approbation; and even supposing ★ *Grant* v. *Gould* (*h*) to [★ 459] furnish some argument that the writ might be directed to him before execution, it was impossible to discover what he could be required to abstain from after execution; and admitting for a moment that it was possible to direct any writ directly to the sovereign, it was manifest that what the sovereign had power to do, independently of any inquiry, could equally be done though the inquiry should not be satisfactory to a Court of law, or even though the Court which conducted it had no legal jurisdiction to inquire (*i*).

After judgment or sentence has been given by the subordinate tribunal, the general rule is that a prohibition will only be granted where the want or excess of jurisdiction is apparent on the face of the proceedings; it being never too late where the ground of application is *pro defectu jurisdictionis*, and not merely *pro defectu triationis*. After judgment.

(*f*) See Denton *v.* Marshall, 1 H. & C. 654; 32 L. J. Eq. 89.

(*g*) Kimpton *v.* Willey, 9 C. B. 719; 19 L. J. C. P. 269.

(*h*) 2 H. Bl. 69. In this case the Court discharged a rule for a prohibition to the Judge Advocate, on it being satisfactorily shewn that no valid objection existed to the proceedings of the court martial. "Nothing was said respecting the person to whom it was addressed; otherwise it is not easy to see what power the judge advocate could possess after the sentence had been reported to his majesty and received his royal approbation; and the prayer of the suggestion is remarkable in humbly imploring that the writ may be directed to Sir Charles Gould, the judge advocate *or to some other competent person or persons*, to hinder him from proceeding in ordering the execution of the sentence. That case clearly falls short of the purpose for which it was cited, as the sentence was not fully executed; and this fact is stated in the affidavit on which the rule was founded;" *per* Lord Denman, *Re* Poe, 5 B. & Ad. 687.

(*i*) *Re* Poe, 5 B. & Ad. 681, 688. See also Denton *v.* Marshall, 1 H. & C. 660; Roberts *v.* Humby, 3 M. & W. 120; Yates *v.* Palmer, 6 D. & L. 283.

It is a settled rule, according to Abbott, C.J. (*k*), that you cannot apply for a prohibition after a judgment, unless there be an original want of jurisdiction apparent upon the face of the proceedings; the principle of the rule being that "if you wait and take the chance of a sentence in your favour, you cannot afterwards object to the jurisdiction, unless it appears on the face of the proceedings that the Court had no jurisdiction" (*l*).

This being the reason of the rule, it follows that there may be an exception to it where there has been [★ 460] no acquiescence on the part of ★ the applicant, and where there has been no opportunity of applying for a prohibition before the Court below had delivered judgment (*m*).

Prohibition or appeal.

A difficult question sometimes may arise, where an appeal lies from the Court sought to be prohibited to some other tribunal, whether the erroneous procedure in the court below is ground for a prohibition or is properly the subject-matter of appeal (*n*).

An application for a prohibition to the Divorce Court was refused on the ground that the grievance of the applicant might have been redressed by a Court of appeal (*o*).

But in none of the numerous early cases as to Ecclesiastical Courts dealing erroneously with matters triable at common law, but properly before them, does it seem to have been considered an objection to prohibition that the decision of the particular Court might have been appealed against to some higher ecclesiastical tribunal; at any rate where the construction of an Act of Parliament was involved (*p*).

(*k*) Delivering the judgment of the Court in *Ex parte* Cowan, 3 B. & A. 129.

(*l*) *Per* Lord Abinger, C.B., Roberts *v.* Humby, 3 M. & W. 122. See also Buggin *v.* Bennett, 4 Burr. 2037, 2038.

(*m*) See Roberts *v.* Humby, *ubi supra;* Serjeant *v.* Dale, L. R. 2 Q. B. D. 558, where the prohibition was granted after sequestration, and months after sentence.

(*n*) See *per* Lord Blackburn in Mackonochie *v.* Lord Penzance, L. R. 6 App. Cas. 445. See also Gare *v.* Gapper, 3 East, 472, and *Ex parte* Smyth, 2 C. M. & R. 754 (*per* Lord Abinger, C.B). And *per* Lord Kenyon and Buller, J., in Leman *v.* Goulty, 3 T. R. 4, 5; *per* Lord Ellenborough, Bulwer *v.* Hase, 3 East, 220; Halliday *v.* Harris, L. R. 9 C. P. 680.

(*o*) Foster *v.* Foster, 4 B. & S. 187; 32 L. J. Q. B. 312.

(*p*) See judgment of Exchequer Chamber in Veley *v.* Burder, 12 A. & E. 313, 314, and the cases there referred to. See also White *v.* Steele, 12 C. B. N. S. 410, where it was held that the pendency of an appeal from a subordinate to a higher ecclesiastical tribunal, in which the errors of the subordinate tribunal might be corrected, was no bar to a prohibition. And see the judgment

If, however, the error of the lower ecclesiastical tribunal is one relating to the practice of that court, and does not violate any Act of Parliament or any principle of natural justice, appeal to the higher Ecclesiastical Court and not prohibition is the proper remedy.

On this point Thesiger, L.J., in a judgment (*q*), adopted and made ★ his own by Lord Cairns (*r*), [★ 461] said :—"Upon the assumption that no statutory provision is violated, it appears to me that the proceedings would not have been properly the subject of a writ of prohibition, even if they had not been warranted by ecclesiastical law and practice . . . The mode in which the suit is to be conducted, the sentence which it is open to the judge to pronounce, and the means by which that sentence is to be enforced, are all, in the absence of statutory provision relating to these matters, to be regulated by the practice of the Court itself, and in respect of which, if the judge errs, appeal and not prohibition would be the proper remedy ; unless his error involves the doing of something which, in the words of Littledale, J., in *Ex parte Smyth* (*s*), is 'contrary to the general laws of the land ;' or, to use the language of Lush, J., in the Court below (*t*), is 'so vicious as to violate some principle of justice.'" The judgment in the same case of Lord Watson, in the House of Lords, was practically to the same effect (*u*). "The question," said Lord Selborne (*x*), "resolves itself simply and entirely into one of the proper course, practice and procedure of an ecclesiastical court, in a cause of which that court had proper cognizance, against a person and in a matter properly subject to its jurisdiction. Such a question, in my opinion, ought to be determined in the ecclesiastical and not (by prohibition or otherwise) in any temporal form . . . The remedy, if there be any error in judgment, is by appeal" (*y*).

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of Lord Ellenborough in Gould *v.* Gapper, 5 East, 364 *seq.* Lord Denman, indeed, said in one case (Griffin *v.* Ellis, 3 P. & D. 403) : "It has been often held that an erroneous judgment on matters within the cognizance of the Court Christian will not entitle to prohibition, but only to appeal," and see the cases referred to in note (*y*), *post.*

(*q*) Martin *v.* Mackonochie, L. &. 4 Q. B. D. 731, 732.
(*r*) Mackonochie *v.* Lord Penzance, L. R. 6 App. Cas. 440.
(*s*) 3 A. & E. 719, 724. (*t*) L. R. 3 Q. B. D. 739.
(*u*) See L. R. 6 App. Cas. 459. (*x*) Id. 431.
(*y*) See also *Ex parte* Smyth, Tyr. & Gr. 222. We find some old authorities to a like effect; *e.g.*, *per* Richardson, J., in Denne & Spark's case (Hat. 113), "if they will not pursue their rules and order of justice, that is not a cause of a prohibition, but appeal." And in Clarke's case, temp. 21 Jac. 1, a prohibition was

If the judge of the inferior Court has jurisdiction over the subject-matter of a suit but not power to certify for costs, his so certifying is not ground of prohibition (*z*).

As to misconstruction of an Act of Parliament, the rule of law is that misconstruction of the Act as to a point of jurisdiction is matter of prohibition in an [★ 462] inferior court, but misconstruction of ★ an Act of Parliament upon a matter which is within that jurisdiction is matter of appeal (*a*).

Prohibition or injunction.

Jessel, M.R., considered that where the Court has power to grant either a prohibition or an injunction, the latter and not the former should be granted, where it is a shorter and cheaper mode of attaining the same end (*b*).

Where decision of inferior Court has been affirmed by the High Court.

If a party appeals to a superior Court from the determination of an inferior tribunal, and the superior Court affirms the existence of jurisdiction on the part of the inferior Court, can he apply for a prohibition to any other division of the Supreme Court? The point arose in an Irish case (*c*), in which the existence of jurisdiction on the part of justices to determine a complaint in a summary way was affirmed (on a case stated) by the Court of Queen's Bench. The judgment of the Queen's Bench having been pleaded to a declaration in prohibition ordered by the Lord Chancellor (Lord O'Hagan), his Lordship, on demurrer, held the plea bad, notwithstanding 20 & 21 Vict. c. 43, s. 6; considering the judgment of the Queen's Bench not of such force and finality as of itself to nullify the jurisdiction of the Court of Chancery; that an ineffectual exercise of the right of appeal did not, in a fit case, forbid a prohibition; and that failure before one Court was no sufficient bar to access to another (*d*). But this decision of the Lord Chancellor was reversed by the unanimous judgment of the Irish Court of Exchequer Chamber (*e*).

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denied because by intendment the applicant would be aided by appeal (Vin. Abridg. tit. Prohibition, N.).

(*z*) Farrow *v.* Hague, 3 H. & C. 101; 33 L. J. Ex. 258.

(*a*) *Per* Brett, L. J., Denaby, &c., Co. *v.* Manchester Railway Co., 3 Nev. & M. Ry. Cas. 443.

(*b*) Hedley *v.* Bates, L. R. 13 Ch. D. 502. In one case, in the time of Lord Hardwicke, the application was for an injunction instead of a prohibition; Dunn *v.* Coates, 1 Atk. 288.

(*c*) Devonshire *v.* Foote, Ir. L. R. 5 Eq. 314.

(*d*) Page 318.

(*e*) Devonshire *v.* Foote, Ir. L. R. 7 Eq. 365. The report only states the fact of the reversal of the Lord Chancellor's decision.

★ CHAPTER III. [★ 463]

APPLICATIONS OF THE PRECEDING PRINCIPLES.

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1. Ecclesiastical Courts.

General rules as to prohibition to ecclesiastical courts.

There is a want of precision in the language of the Courts when deciding as to the cases in which a prohibition lies to the Ecclesiastical Tribunals. The following appears to be the result of the cases on the subject.

(1.) A prohibition will lie where the Ecclesiastical Court entertains a matter in which it has no jurisdiction at all.

(2.) In a matter purely of ecclesiastical cognizance, and where no question triable at the common law incidentally arises, the temporal ★Court will not [★ 464] interfere, however erroneous the decision of the Ecclesiastical Court may be, and however irregular its pro-

cedure, provided it be not in violation of natural justice; and this whether an appeal does or does not lie (*a*).

(3.) In a matter properly of ecclesiastical cognizance, where a question triable at the common law incidentally arises, the Ecclesiastical Court is not precluded from deciding it; but it is bound to decide according to the rules of the common law; and if the Ecclesiastical Court decide it otherwise, a prohibition will lie (*b*).

(4.) If a subordinate Ecclesiastical Court commits an error, other than the misconstruction of an Act of Parliament, which is corrigible on appeal by a higher ecclesiastical tribunal, it will be presumed that the higher tribunal will correctly administer the law; and not till after its sentence should a prohibition be moved for (*c*).

(5.) It is not necessary, to entitle to a prohibition, that the temporal Court should have cognizance of the matter dealt with in the Ecclesiastical Court, it is enough that the latter Court exceeds its jurisdiction (*d*).

Antiquity of jurisdiction.

The jurisdiction to prohibit Ecclesiastical Courts has been continuously exercised from the earliest times (*e*). The remonstrances of the clergy against the frequent interference by prohibition with the action of the Ecclesiastical Courts were embodied by Archbishop Boniface in the *Articuli Cleri* of 51 Hen. 3. The statute of *Circumspecte Agatis*, 13 Ed. 1 st. 4, recognized the right of the Courts Christian to deal with a number of matters enumerated in it, "*regiâ prohibitione non obstante*;" and this enactment (repealed in some particulars by the Statute Law Revision Act of 1863, 26 & 27 Vict. c. 125) still marks the boundary line between the temporal and ecclesiastical jurisdictions.

Matters not triable by ecclesiastical courts.

Matters of freehold and the rights of inheritance are [★ 465] only ★determinable in the temporal courts; so that if the Ecclesiastical Court intermeddles with them, a prohibition lies (*f*).

(*a*) See *per* Littledale, J., *Ex parte* Smyth, 3 A. & E. 724; *per* Lush, J., Martin *v.* Mackonochie, L. R. 3 Q. B. D. 739; *per* Lord Blackburn in Mackonochie *v.* Lord Penzance, L. R. 6 App. Cas. 440, and *per* Lord Watson, id., 458, 459.

(*b*) See *per cur.* Robert's case, Cro. Jac. 270; the judgment in Gould *v.* Gapper, 5 East, 362 *seq.*; and the cases referred to *post.*

(*c*) Griffin *v.* Ellis, 3 P. & D. 398, 403.

(*d*) Com. Dig. Prohib. F. 1.

(*e*) Glanville (who wrote about 31 H. 1), notices two instances of prohibitions to the Ecclesiastical Courts.

(*f*) Bac. Abrid. Proh. L. 2. F. N. B. 40; 2 Roll. Abrid. 286; Cro. Jac. 270; Cro. Car. 65; 2 Roll. Abrid. 285, 286, and authorities there referred to. Hilliard *v.* Jeffreson, Ld. Ray. 212; Binsted *v.* Collins, Bunb. 229.

A prohibition was granted to the Ecclesiastical Court, where the issue raised there was as to the existence of a prescriptive right to seats in the body of a parish church (*g*); also where a modus was pleaded, and the question was as to its existence (*h*); provided the plea was not bad on the face of it (*i*). So a prohibition would lie where the question is whether a particular place is or is not a parish (*k*); or what are the boundaries of a parish (*l*); or whether a church is a parochial church or a chapel of ease (*m*); or whether a custom does or does not exist (*n*); or whether a way to church is a highway or not (*o*); or as to the validity of institution after induction (*p*); or where the defamation proceeded for consists of temporal offences only (*q*), or where, after compelling churchwardens to deliver in their accounts, the spiritual Court proceeded to decide on the propriety of the charges (*r*); or where the citation disclosed no spiritual offence (*s*).

Where the existence of the custom or modus was not traversed ★ when alleged, or not pleaded in [★ 466] the Ecclesiastical Courts, a prohibition was refused (*t*).

A prohibition was granted to stay a suit in the spiritual court for breaking open a chest in the church

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(*g*) Byerley *v.* Windus, 5 B & C. 1; *Re* Bateman, L. R. 9 Eq. 660. See the form of order made by the Court fully set out at the end of this case.

(*h*) Darby *v.* Cozens, 1 T. R. 552, 556; French *v.* Trask, 10 East, 348.

(*i*) Roberts *v.* Williams, 12 East, 33.

(*k*) Rutland *v.* Bagshaw, 14 Q. B. 869; Brown *v.* Palfry, 3 Keb. 286; 2 Roll. Abr. 291, tit. Proh. L. 3.

(*l*) Foster *v.* Hide, 1 Roll. 332; Stransham *v.* Cullington, Cro. Eliz. 228; *per* Hale, C.J., 3 Keb. 286; 2 Roll. Abridg. 291.

(*m*) See 2 Roll. Abr. 291.

(*n*) See Churchwardens *v.* Rector of Market Bosworth, 1 Ld. Ray. 435. The reason being, according to Holt, C. J., because the spiritual Court has "different notions of customs, as to the time which creates them, from those that the common law hath. For in some cases the usage of ten years, in some twenty, in some thirty years, makes a custom in the spiritual Court; whereas by the common law it must be time whereof," &c. (Ib.) See also Dunn *v.* Coats, 1 Atk. 288; Dolby *v.* Remington, 9 Q. B. 179. Cf. Jones *v.* Stone, 2 Salk. 550.

(*o*) 2 Roll. Abr. 287; 1 Bulst. 67. See also 2 Roll. Rep. 41, 287.

(*p*) Hutton's case, Hob. 15; Holt's case, 1 Bulst. 179.

(*q*) See Hollingshead's case, Cro. Car. 229; Evans *v.* Gwyn, 5 Q. B. 844; *Ex parte* Evans, 7 Jur. 420. Cf. Evans *v.* Brown, 2 Ld. Ray. 1101, and see Galizard *v.* Rigault, 2 Salk. 552.

(*r*) Leman *v.* Goulty, 3 T. R. 3.

(*s*) Francis *v.* Steward, 5 Q. B. 984.

(*t*) Jones *v.* Stone, 2 Salk. 550; Dutens *v.* Robson, 1 H. Bl. 100; Anon., 2 Salk. 551; differing from Bishop of Winchester's case, 2 Rep. 45.

and taking away the title deeds to the advowson (*u*). A prohibition was also obtainable if the spiritual court proceeded against a man for publishing a libel (*x*); or to punish him for treason, felony, or any other offence punishable in the temporal courts (*y*); or to try a question which had been already determined by the temporal court (*z*). So also wherever an offence, *per se* triable in the Ecclesiastical Court, was accompanied by any circumstances triable only by the temporal court (*a*); or where, as to any matter not within their original jurisdiction, but arising collaterally before them, they required or admitted evidence other than that required or admitted by the temporal courts (*b*).

Where churchwardens libelled a parishoner in the spiritual court for payment of a rate, which appeared on the face of the proceedings in that court to be illegal and void, a prohibition was granted (*c*). A prohibition was granted also where the invalidity of the rate was shewn to the spiritual judge in the course of the proceedings (*d*); but in this case it was assumed that the spiritual Court had come to an erroneous decision on the statutes 58 Geo. 3, c. 45, and 59 Geo. 3, c. 30: whether or not the spiritual Court was only in progress of considering the question seems not to have been discussed (*e*). If the subject of the validity of the rate were still under the consideration of the spiritual Court a prohibition would not be granted (*f*).

Where an appeal from the Arches Court to the Judi- [★ 467] cial ★ Committee of the Privy Council, in a suit for non-payment of church rates, was pending, an application for a prohibition, on the ground that the rate was bad and appeared to be so from facts stated on the pleadings, was refused; the matter being properly one of ecclesiastical jurisdiction and no erroneous step having been taken.

(*u*) Gardner *v.* Parker, 4 T. R. 351, distinguishing Welcome *v.* Lake, 1 Sid. 221, 2 Keb. 21.

(*x*) Anon., Comb. 71.

(*y*) See Bac. Abr. Proh. L. 3.

(*z*) Boyle *v.* Boyle, 3 Mod. 164; Webb *v.* Cook, Cro. Jac. 535.

(*a*) See, for example, Gallisand *v.* Rigaud, 2 Ld. Ray. 809, and the Abbot of St. Alban's case (22 Ed. 4) there referred to.

(*b*) See Shotter *v.* Friend, 3 Mod. 286; Prince *v.* Huett, 1 Sid. 161.

(*c*) Burder *v.* Veley, 12 A. & E. 233; see also Gosling *v.* Veley, 7 Q. B. 406.

(*d*) Blacket *v.* Blizard, 9 B. & C. 851.

(*e*) *Per* Lord Denman in Hall *v.* Maule, 7 A. & E. 728.

(*f*) Ib. See also R. *v.* Consistorial Court of London, 2 B. & S. 339.

A prohibition was granted to a consistory court for refusing to admit a responsive allegation that at the vestry, on the propriety of whose action the validity of a rate depended, a poll had been duly demanded and refused (*g*); also where a consistory court proceeded to hear exceptions to an inventory exhibited by an executor (*h*); also where the judge appointed under the Public Worship Act, 1874 (37 & 38 Vict. c. 85, s. 7), heard a case outside the limits defined by the requisition of the archbishop (*i*); and where a proceeding under the same Act was set in motion against an incumbent by the bishop, who was also patron of the benefice or preferment held by the incumbent (*k*).

An archbishop having, in the exercise of his general authority as visitor of an ecclesiastical body, passed sentence depriving a dean of his dignity and place, &c., for simony, without any such formal proceeding as is required by 3 & 4 Vict. c. 86, in the case of criminal suits or proceedings against clerks in holy orders (s. 23), a prohibition was granted (*l*); also where a bishop, wrongly claiming a right to present by lapse to a residential canonry, not only cited the dean and chapter (in whom the right of election lay) to appear before him and shew cause why the bishop should not by his visitatorial authority fill up the vacancy, but afterwards issued a mandate to the dean and chapter to admit the person appointed by him into actual residence (*m*); also where a suit was instituted in the Ecclesiastical Court against a clergyman after the period limited by statute (*n*).

★ The refusal of the bishop of a diocese to [★ 468] grant letters of request is not ground for prohibiting the archbishop from issuing a commission under 3 & 4 Vict. c. 86, s. 24 (*o*).

(*g*) White *v.* Steele, 10 C. B. N. S. 383. Compulsory church rates were abolished by 31 & 32 Vict. c. 109.

(*h*) Henderson *v.* French, 5 M. & S. 406; Griffiths *v.* Anthony, 5 A. & E. 623.

(*i*) Hudson *v.* Tooth, L. R. 3 Q. B. D. 46; 47 L. J. Q. B. 18. See also Serjeant *v.* Dale, L. R. 2 Q. B. D. 558.

(*k*) Serjeant *v.* Dale, *ubi supra.*

(*l*) *Re* Dean of York, 2 Q. B. 1. Distinguish Rackham *v.* Bluck, 9 Q. B. 691, where it was held that a proceeding in the Consistorial Court to recover penalties for non-residence under 1 & 2 Vict. c. 106, ss. 32, 114, was not a criminal suit within 3 & 4 Vict. c. 23.

(*m*) Bishop of Chester *v.* Harward, 1 T. R. 650.

(*n*) Free *v.* Burgoyne, 5 B. & C. 400.

(*o*) *Ex parte* Denison, 4 E. & B. 292. Consult this case also as to what amounts to an adjudication by the bishop on a charge against a clergyman.

The Court will not interfere by prohibition with the decision of a bishop under 1 & 2 Vict. c. 106, s. 54, as to whether a spiritual person has "any legal cause of exemption from residence" (*p*).

A prohibition was refused to stay a suit, for officiating in an unlicensed chapel without the license and against the monition of the bishop of the diocese, brought against a person who had been ordained a priest, but who had subsequently become a dissenter (*q*).

Where a person was sued out of his diocese, in a matter properly of ecclesiastical cognizance, it was held in the time of Holt, C.J., that a prohibition would not be granted unless applied for before sentence; because, though the matter did not belong to that spiritual court, it did to some other, and not to the temporal court (*r*).

The same rule has been held to apply wherever the ground of application does not appear on the face of the proceedings (*s*).

It is not necessary, however, that the absence of jurisdiction should appear on the face of the libel; it is sufficient, after sentence, if it appears that the spiritual court has misconstrued an Act of Parliament (*t*).

Construing Act of Parliament.

The misconstruction of any Act of Parliament by the Ecclesiastical Court was always ground of prohibition (*u*).

But it is no ground for prohibition that the spiritual court would have to determine the effect of an Act of Parliament which, until an erroneous decision is actually given, it will be presumed that the Court will construe correctly (*x*).

Prohibition after sentence.

[★ 469] ★ Where the spiritual court has no original jurisdiction, it is never too late to apply for a pro-

(*p*) *Ex parte* Bartlett, 12 Q. B. 488.

(*q*) Barnes *v.* Shore, 8 Q. B. 640. See now 33 & 34 Vict. c. 91.

(*r*) Gardner *v.* Booth, 2 Salk. 549.

(*s*) Argyle *v.* Hunt, 1 Str. 187; cf. *per* Ld. Kenyon, Leman *v.* Goulty, 3 T. R. 4. See also Evans *v.* Gwyn, 5 Q. B. 844; Rickets *v.* Bodenham, 4 A. & E. 441. *Sed vide contra*, Paxton *v.* Knight, 1 Burr. 314.

(*t*) Gould *v.* Gapper, 5 East, 345.

(*u*) See Gould *v.* Gapper, 5 East, 345, and the various cases referred to in the judgment. See also *per* Lord Watson, Mackonochie *v.* Lord Penzance, L. R. 6 App. Cas. 458, 459.

(*x*) Hall *v.* Maule, 7 A. & E. 721. In Cockburn *v.* Harvey, 2 B. & Ad. 797, where a prohibition was granted, this point does not appear to have been taken; the judgment dealing only with the question as to the proper construction of the Act of Parliament. See Blacket *v.* Blizard, 9 B. & C. 851, distinguished in Hall *v.* Maule, 7 A. & E. 729.

hibition (*y*). And the same is the case where the excess or want of jurisdiction appears on the face of the proceedings.

And in some cases a prohibition cannot properly be moved for before sentence has been pronounced, *e.g.*, where a sentence of deprivation is the only part of the proceeding beyond the jurisdiction of the Court to be prohibited (*z*).

When question as to custom is not ground for prohibition.

Though the Court Christian cannot try the existence of a custom, there is no ground for a prohibition if the alleged custom be wholly immaterial, so that it is perfectly indifferent which way it is found (*a*); or if it is not denied (*b*); nor, according to a case in the time of Lord Hale, where the spiritual court negatived the existence of a custom on which the libel was founded (*c*); and a suggestion that the Ecclesiastical Court is likely to entertain a question not triable by them is insufficient (*d*).

Offence also punishable temporally.

That an offence is punishable temporally is not ground for prohibiting an Ecclesiastical Court proceeding in respect of the same offence, *e.g.*, a proceeding in respect of forgery, or for obscenity, or unnatural offences, for the purpose of deprivation only (*e*); neither is the fact of a temporal loss resulting from it (*f*).

Neither is it sufficient ground for prohibition that the bishop of the diocese is interested (by guaranteeing to the promovent his expenses) in a cause before the chancellor of the diocese, in the consistorial court of the diocese (*g*).

Where part of the matter is cognizable by Ecclesiastical Court.

★ If the proceeding in the Ecclesiastical [★ 470] Court is in respect of two distinct things, one of which is of ecclesiastical cognizance and the other not, a pro-

(*y*) Parker *v.* Clarke, 3 Salk. 87.

(*z*) See *Re* Dean of York, 2 Q. B. 40.

(*a*) *Per cur.* Rutland *v.* Bagshaw, 14 Q. B. 889.

(*b*) Dutens *v.* Robson, 1 H. Bl. 100.

(*c*) Churchwardens *v.* Rector of Market Bosworth, 1 Ld. Ray. 435.

(*d*) *Ex parte* Law, 2 A. & E. 45; cf. Blunt *v.* Harwood, 3 N. & P. 577; and Dutens *v.* Robson, *ubi supra.*

(*e*) See Slater *v.* Smalebrook, 1 Sid. 217; 1 Lev. 138, and Townsend *v.* Thorpe, 2 Ld. Ray. 1507, referred to in the judgment of the House of Lords in Free *v.* Burgoyne, 2 Bligh. N. S. 79, 80. See also Burder *v.* Hodgson, 4 Notes of Cases, 488, and Dean of Jersey *v.* Rector of ———, 3 Moo. P. C. 229.

(*f*) Baker *v.* Rogers, Cro. Eliz. 789.

(*g*) *Ex parte* Medwin & Hurst, 1 E. & B. 609. See also Bishop of Lincoln *v.* Smith, 1 Vent. 3, where Keyling and Twisden, JJ., refused to prohibit a proceeding by a bishop in his own court, for a pension. The distinction between the Chancellor and the Commissary is pointed out by Lord Campbell in 1 E. & B. 616.

hibition will be granted *quoad* that which is of temporal cognizance (*h*). But, after sentence, in such a case, it will be presumed that the Ecclesiastical Court has proceeded only upon the matters within its cognizance, unless the opposite be clearly shewn (*i*). After sentence, absence of jurisdiction had always to be clearly shewn (*k*).

Submission to jurisdiction.

Where a party resident out of the jurisdiction of the Ecclesiastical Court was cited and appeared and pleaded without objection, an intervener was refused a prohibition (*l*).

But a plaintiff in the Ecclesiastical Court might obtain a prohibition to stay his own suit where the defendant raised some point out of the jurisdiction (*m*).

Mere irregularities in procedure.

As already stated, mere irregularities in the procedure of an Ecclesiastical Court, not amounting to a contravention of natural justice, are not considered ground of prohibition (*n*): the proper course is to apply to the Court which has dominion over its own practice, or to a superior tribunal by way of appeal (*o*).

Appeal distinguished from prohibition.

The jurisdiction in prohibition "does not enable the temporal court to act as a Court of Appeal from the Court Ecclesiastical, so as to correct any irregularity or even injustice which may have been done by the Ecclesiastical Court, if done in the exercise of their jurisdiction" (*p*); vide *ante*, pp. 460, 461 (*q*).

[★471] ★2. Vice-Chancellor's Court at Universities.

The Chancellor's Court of the University of Oxford having adjudged, ordering that a person who had brought an action at common law against a resident member of the University should stay his action and pay costs, and on default should be arrested, a prohibition was granted (*r*); there being no power in the

(*h*) *Per cur.* Pense *v.* Prouse, 1 Ld. Ray. 59.

(*i*) Hart *v.* Marsh, 5 A. & E. 602; cf. Ricketts *v.* Bodenham, 4 A. & E. 441.

(*k*) Carslake *v.* Mapledoram, 2 T. R. 473.

(*l*) Chichester *v.* Donegal, 6 Mad. 375. See also Vanacre *v.* Spleen, Carth. 33, and Anon., 2 Show. 155.

(*m*) Worts *v.* Clyston, Cro. Jac. 350, 3 Inst. 607; Paxton *v.* Knight, 1 Burr. 314.

(*n*) *Ex parte* Story, 8 Ex. 195.

(*o*) *Per* Parke, B., id. 202. See also *Ex parte* Smyth, Tyr. & Gr. 222, and Mackonochie *v.* Lord Penzance, L. R. 6 App. Cas. 431, 459.

(*p*) *Per* Lord Blackburn, Mackonochie *v.* Lord Penzance, L. R. 6 App. Cas. 444. See also *per* Lush, J., in the Court below, L. R. 3 Q. B. D. 739.

(*q*) See also Bulwer *v.* Hase, 3 East, 217.

(*r*) Chancellor, &c., of Oxford *v.* Taylor, 1 Q. B. 952.

University Court to mulct in costs a person not a member of the University and to enforce payment by arrest.

A prohibition was granted (26 Car. 2) to the Court of the Vice-Chancellor of Cambridge on the application of a person who had a libel preferred against him in that court for proceeding, by information in the King's Bench, against divers persons who had committed a riot within the jurisdiction of the Vice-Chancellor's Court (*s*).

But the proceeding to be prohibited must be of a judicial kind. Discommuning a tradesman is not such (*t*).

3. Mayor's Court of City of London.

Mayor's Court an inferior court.

The Mayor's Court of the city of London is an inferior court within the meaning of the general rule as to prohibitions (*u*); and a prohibition will be granted where the cause of action has not arisen within its jurisdiction (*v*).

Where cause of action does not arise within City.

Where only part of the cause of action arises within the City, and the defendant neither resides nor carries on business within it, a prohibition will be granted (*x*).

The Mayor's Court has jurisdiction, under sect. 12 of the Mayor's Court Procedure Act, 1857, in all cases not exceeding £50, where the defendant dwells or carries on business within the City, and a part of the cause of action arises there (*y*).

★ An account stated within the City is suffi- [★ 472] cient to give jurisdiction (*z*).

And a prohibition will not be granted to restrain an action on a cheque drawn on a bank out of the jurisdiction, under circumstances which render unnecessary presentment by the indorsee (*a*). Nor where goods ordered by letter, posted in the City, were also delivered there to the defendant (*b*).

Neither would a prohibition lie to restrain the Mayor's Court from re-trying an action on the ground

(*s*) Richardson's case (26 Car. 2), cited Bac. Abrid. Proh. I.

(*t*) *Ex parte* Death, 18 Q. B. 647.

(*u*) See opinion of the judges in Mayor, &c., of London *v.* Cox, L. R. 2 E. & I. App. 256-258, and the authorities there referred to.

(*v*) See also Alderton *v.* Archer, L. R. 14 Q. B. D. 1; Jacobs *v.* Brett, L. R. 20 Eq. 1; Cooke *v.* Gill, L. R. 8 C. P. 107.

(*x*) Gold *v.* Turner, L. R. 10 C. P. 149.

(*y*) Hawes *v.* Paveley, L. R. 1 C. P. D. 418, by the Court of Appeal, overruling the decision of the Court of Common Pleas. And see the previous cases of Quarlty *v.* Timmins, L. R. 9 C. P. 416, and Robinson *v.* Emanuel, L. R. 9 C. P. 414.

(*z*) Taylor *v.* Nicholls, L. R. 1 C. P. D. 242.

(*a*) Wirth *v.* Austin, L. R. 10 C. P. 689.

(*b*) Taylor *v.* Jones, L. R. 1 C. P. D. 87.

of surprise and fresh evidence, after a rule to enter a nonsuit had been obtained and disposed of in the superior Court, under sect. 10 of the Mayor's Court Procedure Act, 1857 (*c*).

A prohibition will not be granted to restrain the Court from adjudicating upon a counterclaim in respect of matters beyond the jurisdiction, to the extent necessary to meet the claim of the plaintiff (*d*).

Where the counterparts of a lease were signed by the vendor and purchaser respectively in the city of London and in Middlesex, then exchanged, and the deposit paid at the office of the purchaser's solicitor in the City, an action in the Mayor's Court for the balance of the purchase-money was prohibited, on the ground that no part of the cause of action arose within the jurisdiction; the defendant having signed in Middlesex (*e*).

Where part of the plaintiff's cause of action did not arise within the city of London, but, on shewing cause against a rule for a prohibition, the plaintiff abandoned wholly this part, the Court discharged the rule for a prohibition, but without costs (*f*).

A prohibition was granted where the defendants, being a railway company, had their principal station outside the City, though they had one of their station's within it (*g*).

Also to restrain the making of orders or committing [★ 473] to prison ★ under sect. 5 of the Debtor's Act, 1869, where the judgment debtor was not at the time of issuing the summons resident or carrying on business within the City (*h*).

A judgment signed at the Queen's Bench office in the Temple, on a judgment of the Supreme Court of China and Japan, for money lent in China, was held not to be a debt arising within the city of London as to give jurisdiction to the Mayor's Court to attach moneys of the defendant in the City; and a prohibition was granted (*i*).

Prohibition after removal

A prohibition will be granted even after the judgment of the Mayor's Court has been removed into the

(*c*) Lebeau *v.* General Steam Navigation Co., L. R. 8 C. P. 129.
(*d*) Davis *v.* Flagstaff Mining Co., L. R. 3 C. P. D. 228. Vide *ante*, pp. 451, 452.
(*e*) Alderton *v.* Archer, L. R. 14 Q. B. D. 1; 53 L. J. Q. B. 4.
(*f*) Ellis *v.* Fleming, L. R. 1 C. P. D. 237.
(*g*) See Le Tailleur *v.* South Eastern Railway Co., L. R. 3 C. P. D. 18.
(*h*) Washer *v.* Elliott, L. R. 1 C. P. D. 169.
(*i*) Tapp *v.* Jones, L. R. 9 C. P. 418.

superior Court, under sect. 48 of 20 & 21 Vict. c. clvii. (the Mayor's Court Procedure Act, 1857) (*k*).

of judgment into superior court.

It may now be taken as settled, notwithstanding the decision in *Manning* v. *Farquharson* (*l*) (followed in *Baker* v. *Clark*) (*m*), that sect. 15 of the Mayor's Court Act, 1857 (*n*), does not prevent the defendant to an action in that Court from moving for a prohibition. That decision was disapproved in the opinion of the Judges (*o*), delivered by Willes, J., to the House of Lords in *Mayor, &c., of London* v. *Cox* (*p*); and has been expressly dissented from by Jessel, M R., in *Jacobs* v. *Brett* (*q*), and by Lord Coleridge, C.J., Brett and Archibald, JJ., in *Bridge* v. *Branch* (*r*); all of whom concurred in holding that sect. 15 of the Mayor's Court Procedure Act, 1857, applies only to the modes of objecting before that Court to its jurisdiction, and that it has no application to the High Court. It had previously been decided that the section did not affect the right of a garnishee to apply for a prohibition (*s*).

Effect of s. 15 of Mayor's Court Act, 1857.

Custom of foreign attachment.

To a declaration in prohibition, the Mayor's Court pleaded an ★ immemorial custom in case of [★ 474] any plaint of debt levied in the Mayor's Court, followed by process and a return of *nihil*, then to attach the defendant by any debt [wherever arising] due to him from any other person "found within the jurisdiction of the said Court," and after four defaults of the defendant, then to award execution against the garnishee to pay the plaintiff, he giving security by sufficient pledges to restore to the defendant the sum attached if he within a year and a day comes into court and disproves or avoids such debt, &c.;—in short, claiming jurisdiction because the debtor of the debtor was found within the City, though none of the parties resided therein, and though there was no jurisdiction in respect of the original cause of action. This plea was, on demurrer, held bad "because the custom relied upon

(*k*) Bridge *v.* Branch, L. R. 1 C. P. D. 633.

(*l*) 30 L. J. Q. B. 22; a decision of Crompton, J., in the Bail Court, subsequently approved by the judgment of the Exchequer Chamber delivered by the same learned judge, in Mayor, &c., of London *v.* Cox, 2 H. & C. 409.

(*m*) L. R. 8 C. P. 121.

(*n*) This section enacts that "no defendant shall be permitted to object to the jurisdiction of the Court by any proceeding whatever, except by plea."

(*o*) Willes, Blackburn, Shee, and Smith, JJ., and Pigott, B.

(*p*) L. R. 2 E. & I. App. 259.

(*q*) L. R. 20 Eq. 1.

(*r*) L. R. 1 C. P. D. 633.

(*s*) Mayor, &c., of London *v.* Cox, L. R. 2 E. & I. App. 239.

transgresses the local limits; and the customary proceeding is avowedly accessory to a limited jurisdiction, and is incongruous and therefore void, as setting up an accessory more extensive than the principal . . . . And if the custom set up did in fact prevail before the Statute of Westminster the First, it was not only void by the common law, but was also by that statute declared to be illegal" (*t*).

The custom of foreign attachment, like other customs, must be local in order to be valid; and a summons issued for a debt not arising within the jurisdiction, is one which the Court has no warrant to issue (*u*). [★ 475] ★ To give jurisdiction, the garnishee must not only be "found" within the City, but must also be resident within the City (*x*).

A garnishee does not, by pleading *nil habet* in the Mayor's Court, disqualify himself from applying for a prohibition (*y*). In granting a prohibition on the application of a garnishee who had done so, Lord Campbell said: "He was bound to put in a plea that he might avoid judgment; and, before the trial of the issue upon that plea, and within a reasonable time after pleading it, he applies for a prohibition to prevent further proceedings in an action which ought never to have been commenced. *Hoc statu*, a stranger might successfully apply for a prohibition, and surely so may the garnishee" (*z*).

The custom of foreign attachment as it existed in this

(*t*) Mayor, &c., of London *v.* Cox, L. R. 2 E. & I. App. 253–255. "It appears to be in accordance with authority and good sense to hold that a man who could not be sued in London by his own creditor cannot by the mere act of using the Queen's highway through the City, whether on his own business or the Queen's, as a juryman at the Central Criminal Court, or a witness at Guildhall (for the custom as alleged includes *all*) become liable to be stayed there under the custom of the place by the alleged creditor of his creditor. Both upon this latter ground, and also upon the distinct ground that the debtor, not liable to be sued in London, of a creditor not liable to be sued in London, cannot, by entering the City of his own head, create a jurisdiction against his creditor, the custom as pleaded is bad, and the plea is no answer to the declaration."—Ib., pp. 274, 275.

(*u*) See *per* Willes, J., L. R. 2 E. & I. App. 265, 266; *per* Lord Campbell, C.J., De Haber *v.* Queen of Portugal, 17 Q. B. 213. The cases of Banks *v.* Self (5 Taunt. 234), and Harington *v.* McMorris (ib. 228), only shew the course of pleading in the case of a garnishee, who, without collusion, and in ignorance of the want of jurisdiction, has paid under compulsion of the attachment, and is afterwards sued by his own creditor (*per* Willes, J., L. R. 2 E. & I. App. 269).

(*x*) See opinion of the judges above cited, L. R. 2 E. & I. App. 273, 274, and the authorities there referred to.

(*y*) Wadsworth *v.* Queen of Spain, 17 Q. B. 217. (*z*) Ib.

court for about 200 years (a custom which, as observed by Bramwell, L.J., enabled a man to enforce *ex parte* a claim, without giving him against whom it was made notice that it was so made), received its death-blow from the decision of the Court of Appeal, in the case of the *London Joint Stock Bank* v. *Mayor of London*, (*a*), where a prohibition was granted to stay all proceedings against the garnishee.

4. County Courts.

Matter excluded from their cognizance by statute.

The jurisdiction of the modern county courts being fixed by statute, a prohibition will be granted wherever they deal with any question excluded from their cognizance by Act of Parliament.

Thus wherever (except in actions of replevin (*b*) or any other case where a special jurisdiction is given by statute (*c*)), there is reasonable evidence that title to land is in question (*d*); but a ★ mere assertion [★ 476] of title by the defendant, even though sworn to by him, does not necessarily oust the jurisdiction (*e*).

Where title to land being really in question, the county court judge nonsuited and awarded costs to the defendant, a prohibition was granted; as there was no jurisdiction to give costs in such a case (*f*).

Prohibitions have also been granted where the title to a toll was in question (*g*); or the title to an office such as that of parish clerk (*h*) or bailiff of a city (*i*).

But a claim of a *profit à pendre*, though *bonâ fide*, will not oust the jurisdiction (*k*); nor a claim of a custom (*l*); nor a claim to recover a local rate (*m*).

(*a*) L. R. 5 C. P. D. 494. See also Banque de Credit Commercial *v.* De Gas, L. R. 6 C. P. 142.

(*b*) As to the jurisdiction to try replevin actions though title should be in question, see R. *v.* Raines, 1 E. & B. 855; Fordham *v.* Akers, 4 B. & S. 578.

(*c*) See R. *v.* Harden, 2 E. & B. 188.

(*d*) Lilley *v.* Harvey, 17 L. J. Q. B. 357; Marwood *v.* Waters, 13 C. B. 820; Chew *v.* Holroyd. 8 Exch. 249; Mountnoy *v.* Collier, 1 E. & B. 630; Pearson *v.* Glazebrook, L. R. 3 Ex. 27; *Re* Knight, 1 Exch. 802.

(*e*) Lilley *v.* Harvey, *ubi supra*. See also Wickham *v.* Lee, 12 Q. B. 521; Emery *v.* Barnett, 4 C. B. N. S. 423. *Sed vide*, Marsh *v.* Dewes, 17 Jur. 558.

(*f*) Lawford *v.* Partridge, 1 H. & N. 621; 26 L. J. Ex. 147. See also Yates *v.* Palmer, 6 D. & L. 283.

(*g*) R. *v.* Everett, 1 E. & B. 273. Cf. Hunt *v.* Great Northern Railway Co., 10 C. B. 900.

(*h*) Stevenson *v.* Raine, 2 E. & B. 744.

(*i*) Tinniswood *v.* Pattison, 3 C. B. 243. Cf. Cannon *v.* Smallwood, 3 Lev. 203.

(*k*) Lloyd *v.* Jones, 17 L. J. C. P. 206.

(*l*) Davis *v.* Walton, 8 Exch. 153. See also *Re* Knight, 1 Exch. 802.

(*m*) Stuart *v.* Jones, 1 E. & B, 22.

A prohibition would be granted where the question relating to the delivery up of premises under 9 & 10 Vict. c. 95, s. 122 arose, not between landlord and tenant, but between a tenant and the mortgagee of the landlord (*n*): so if a county court judge should, since the Judicature Act, 1873, grant an injunction to restrain an action in the High Court of Justice (*o*); also to restrain an exercise of Admiralty jurisdiction in a case of collision, where the court of Admiralty would have had no jurisdiction (*p*); and to prevent a levying of execution for interest on a county court judgment, such judgments not coming under sect. 17 of 1 & 2 Vict. c. 110 (*q*).

A prohibition to a county court having Admiralty jurisdiction, in a case of claim for necessaries, being applied for on the ground that the shipowner was domiciled in England, the High Court refused it, as the county court had jurisdiction, under 24 Vict. c. 10, s. 5, and 31 & 32 Vict. c. 71, s. 3, sub-s. 2, unless it were [★ 477] "shewn ★ to the satisfaction of the Court that at the time of the institution of the cause any owner or part owner was domiciled in England or Wales;" and the domicile of the owner was not shewn until after judgment had been given (*r*): besides, the domicile of the owner might have been a disputed fact which the county court judge might have had to decide whilst both parties were before him (*s*).

A prohibition was granted to restrain an action against an administrator, with the will annexed, who resided out of the county court district; the grant of letters of administration having also been made outside the district (*t*). Also where the plaintiff had (contrary to 9 & 10 Vict. c. 95, s. 58) divided his cause of action, which was for an amount beyond the jurisdiction, so as to bring several actions for smaller amounts (*u*).

It is an excess of jurisdiction on the part of a county court judge for which a prohibition will lie, after making an entry of judgment for the defendant in an action,

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(*n*) Jones *v.* Owen, 5 D. & L. 669.
(*o*) Cobbold *v.* Pryke, 49 L. J. Q. B. 8.
(*p*) Everard *v.* Kendall, L. R. 5 C. P. 428.
(*q*) R. *v.* County Court Judge of Essex, L. R. 18 Q. B. D. 704.
(*r*) *Ex parte* Michael, L. R. 7 Q. B. 658.
(*s*) Id., *per* Cockburn, C.J., p. 660.
(*t*) Fuller *v.* Mackay, 2 E. & B. 573.
(*u*) *Re* Akroyd, 1 Ex. 479; 17 L. J. Ex. 157; cf. Kimpton *v.* Willey, 9 C. B. 719; see also Hartley *v.* Ayurst, 11 L. T. O. S. 150: and cf. the old cases referred to, 2 Roll. Abr. 280; F. N. B. 46; Vent. 65, 73; Palm. 564; 2 Keb. 617. Distinguish Wickham *v.* Lee, 12 Q. B. 521; Apothecaries Co. *v.* Burt, 5 Ex. 363.

to alter such judgment after the Court had broken up and the defendant had left, and to order a new trial (*x*); and so also it would seem if, after hearing and refusing an application for a new trial, the judge should hear and accede to a renewed application on a subsequent day (*y*); or if a new judge should receive, and enter up as his own judgment, a written statement of his decision sent him by the deputy of the late judge (*z*).

So if, without the plaintiff's consent, the judge should reduce the claim to £50 in order to give himself jurisdiction (*a*); or if, the particulars of the plaintiff's claim not disclosing a case within the jurisdiction, the judge should amend them so as to bring the case within his jurisdiction (*b*); or if the judge should make a second order of commitment for the same default in paying an ★ instalment of a debt (*c*); or should ex- [★ 478] ercise jurisdiction in Friendly Society disputes, where the statutory condition to the existence of jurisdiction had not been fulfilled (*d*), or on the application of persons not entitled to institute proceedings (*e*).

Errors in judgment or procedure.

The reception of improper evidence is not ground of prohibition (*f*); nor any error, legal or otherwise, in the decision (*g*); nor a mistake as to the time within which process should be delivered in (*h*). "I never heard," said Grove J., "that prohibition would lie where a question of time merely was involved: all the practice has been to the contrary (*i*).

That the county court bailiff had seized in execution goods of the judgment debtor greater in value that the amount over which the county court had jurisdiction, was held no ground for prohibition (*k*).

(*x*) Jones *v.* Jones, 17 L. J. Q. B. 170. Cf. Trustees of Jones *v.* Gittins, 51 L. T. N. S. 599; Smith *v.* McGlone, 8 Ir. L. R. Q. B., &c., Divns. 267.

(*y*) Mossop *v.* Great Northern Railway Co., 16 C. B. 580.

(*z*) Hoey *v.* McFarlane, 4 C. B. N. S. 718. See especially *per* Willes, J., at p. 736.

(*a*) *Re* Hill, 10 Ex. 726; 24 L. J. Ex. 137.

(*b*) Hopper *v.* Warburton, 32 L. J. Q. B. 104.

(*c*) Horsnail *v.* Bruce, L. R. 8 C. P. 378.

(*d*) Smith *v.* Pryse, 7 E. & B. 339. Distinguish Skipton, &c., Society *v.* Prince, 33 L. J. Q. B. 323.

(*e*) Hull *v.* McFarlane, 2 C. B. N. S. 796.

(*f*) *Re* Dunford, 12 Jur. 361 (in Court of Exchequer); Winsor *v.* Durnford, 12 Q. B. 603.

(*g*) Norris *v.* Carrington, 16 C. B. N. S. 396; *Ex parte* Rayner, 5 D. & L. 342; 5 C. B. 162; *Re* Bowen, 15 Jur. 1196; Lexden and Munster Union *v.* Southgate, 10 Exch. 201; Meredith *v.* Withingham, 1 C. B. N. S. 216.

(*h*) Barker *v.* Palmer, L. R. 8 Q. B. D. 9.

(*i*) Id. 11.

(*k*) *Ex parte* Summers, 2 C. L. R. 1284.

The sufficiency of proof of service of the summons has been held to be a question for the determination of the county court judge; and a prohibition was refused where he had determined the question (*l*).

Where a judge, in order to prevent a claim being barred by the statute of Limitations, directed a fresh summons to issue bearing the same date and number as one already served, which, by mistake of an officer of the court, had wrongly described the defendant, the High Court refused a prohibition (*m*).

And where judge wrongly committed, on default in paying an instalment, a debtor who had been discharged from the debt in question by the Insolvent Debtors Court, this was held to be at most an erroneous exercise of his powers as judge, which might entitle the defendant to his discharge, but not a ground of prohibition (*n*).

[★ 479] ★ Where a party applied for a new trial, but did not give the seven clear days' notice of his intention to do so, required by Order XXVIII., r. 1, of the County Court Rules, 1875, and the judge in the absence of the other party granted a new trial, a prohibition was refused; on the ground that the proper course was to have applied, at any rate in the first instance, to the county court judge to set aside as irregular the order made by him for a new trial (*o*).

A prohibition was refused also where a wrong form of summons was used, viz., that prescribed on a judgment *de bonus testatoris*, instead of that appropriate to a judgment *quando acciderint* (*p*).

The same would apply if, in dealing with a case over which he had jurisdiction, *e.g.*, an action for false imprisonment, the judge should in his judgment use expressions as if he was giving damages for a malicious prosecution, as well as for the trespass (*q*).

Action substantially out of jurisdiction.

But where it appeared from the plaint itself or the particulars that the action was one substantially for a malicious prosecution, there being no assault except the constructive one by giving into custody, a prohibition was granted (*r*).

So also where the action was nominally for the re-

(*l*) Zohrab *v.* Smith, 17 L. J. Q. B. 174; Robinson *v.* Lenagham, 17 L. J. Ex. 174.
(*m*) Foster *v.* Temple, 5 D. & L. 655; 17 L. J. Q. B. 230.
(*n*) Stile *v.* Booth, 1 L. M. & P. 440; 19 L. J. Q. B. 521.
(*o*) Trustees of Evan Jones *v.* Gittins, 51 L. T. N. S. 599.
(*p*) Ellis *v.* Watts, 8 C. B. 614.
(*q*) Chivers *v.* Savage, 5 E. B. 697; 25 L. J. Q. B. 85.
(*r*) Jones *v.* Currey, 2 L. M. & P. 474.

covery of moneys paid and for loss of time and attendance before magistrates, on a complaint and information of the defendants which was heard and dismissed, the Court held that the plaint was in substance for a malicious prosecution, and a prohibition was granted (*s*).

Where error is corrigible on appeal.

Wherever the error of the county court is matter of appeal, a prohibition will be refused.

Where the summons though served upon the defendant within the time required by Order VIII., r. 7, of the County Court Rules, 1875, had not been delivered to the county court bailiff within the time therein specified, and the county court judge held the service good and tried the cause, the High Court was of opinion that the proper remedy was by appeal from the ruling of the judge, and not by application for a prohibition (*t*).

Where jurisdiction depends on contested facts.

A prohibition would be refused where the facts on which the ★ jurisdiction depended rested [★ 480] upon conflicting evidence, which it was for the county court to determine (*u*); unless the High Court were convinced that the decision was perverse and not the result of an honest exercise of judgment upon the evidence (*x*).

Where, however, a judge wrongly held that a question of title to land was not involved, a prohibition was granted (*y*).

And if, in arriving at a finding of fact on which the jurisdiction depends, the judge proceeds on a wrong principle, his decision is not conclusive, and a prohibition may be granted (*z*); *e.g.*, where in ascertaining the annual value of premises, so as to give or exclude jurisdiction to try an action of ejectment, the judge deducted from the rent paid by the tenant to the landlord the amount of ground rent paid by the latter. So where, after judgment and execution, an interpleader summons was issued, and the judge erroneously held that the claimant had given an insufficient description of his address, a prohibition was granted to stay execution in the original plaint (*a*).

(*s*) Hunt *v.* North Staffordshire Railway Co., 2 H. & N. 451.

(*t*) Barker *v.* Palmer, L. R. 8 Q. B. D. 9; 51 L. J. Q. B. 110. See also Halliday *v.* Harris, L. R. 9 C. P. 668, 680.

(*u*) Joseph *v.* Henry, 1 L. M. & P. 388; 19 L. J. Q. B. 369; Brown *v.* Cocking, 9 B. & S. 503.

(*x*) See *per* Cockburn, C. J., Elstone *v.* Rose, 9 B. & S. 513.

(*y*) Thompson *v.* Ingham, 1 L. M. & P. 216; 14 Q. B. 710, and see Lilley *v.* Harvey, 17 L. J. Q. B. 357.

(*z*) Elstone *v.* Rose, *ubi supra*. See and distinguish Brown *v* Cocking, 9 B. & S. 503, where the question was solely one of evidence as to annual value, see also Harrington *v.* Ramsay, 2 E. & B. 669; 22 L. J. Ex. 326.

(*a*) *Ex parte* McFee, 9 Exch. 261.

In no case where the jurisdiction depends on the existence of disputed facts is the finding of the judge on those facts absolutely conclusive; but, though not conclusive, "for practical purposes," said Blackburn, J. (*b*), "a strong and peculiar case must be made out to justify us in reversing it and coming to the conclusion that he was wrong."

According to the learned judge just cited (*c*), the rule as to prohibition is nowhere better stated than by Patteson, J., delivering the judgment of the Court in *Thompson* v. *Ingham* (*d*), as follows: "The judge had clearly jurisdiction, *primâ facie*, to try a plaint for use and occupation. The pleadings, if there were any in the county court, would not shew that the title is in question: the point whether it is or not must of necessity arise upon the evidence; and, as soon as it appears [★ 481] that it is, the jurisdiction of ★ the county court ceases. The judge must, of necessity, determine that point for the time, because on it depends whether he hears the case on the merits. Is then his determination conclusive? We think that it is not. The objection is analogous to a plea to the jurisdiction in other courts, which is indeed determined in the first instance by the Court in which it is pleaded, but is subject to a writ of error. The County Court Act (9 & 10 Vict. c. 95) gives no writ of error, or appeal of any sort (*e*); but then it is presumed that the Court deals only with matters within its jurisdiction. If a doubt arises as to that question, we think it impossible to contend that any of the provisions of the Act makes the solution of that doubt by the Court itself final. If so, the question must be open to one of the superior courts on motion for a prohibition."

Partial prohibition.

The prohibition, as already stated, may be partial only (*f*), and subject to the power of the county court to amend (*g*).

Prohibition after judgment.

The prohibition may be granted after judgment and seizure in execution, though the excess of jurisdiction does not appear on the face of the proceedings (*h*).

(*b*) Elstone *v.* Rose, *ubi supra*.
(*c*) Speaking in 1868. Elstone *v.* Rose, *ubi supra*.
(*d*) 14 Q. B. 718.
(*e*) This was in 1850.
(*f*) Vide *ante*, pp. 452, 453.
(*g*) See Walsh *v.* Ionides, 1 E. & B. 383.
(*h*) See judgment in Marsden *v.* Wardle, 3 E. & B. 695; Thompson *v.* Ingham, 14 Q. B. 710; Jones *v.* Owen, 5 D. & L. 669; Pears *v.* Williams, 2 L. M. & P. 515. Vide *ante*, p. 454.

Acquiescence disentitling to prohibition.

The defendant, by appearing and giving notice of a special defence, may lose his right to a prohibition (*k*).

Where the defendant had assented to the making of an order to remit the case to a county court for trial under 19 & 20 Vict. c. 108, s. 26, a prohibition was refused (*l*).

But obtaining a case for the opinion of the superior Court from the judge below will not disentitle to a prohibition, where the jurisdiction of the inferior Court had been objected to (*m*).

Appeal to Court of Appeal.

The enactment in 19 & 20 Vict. c. 108, s. 42 (*n*), that "when an application shall be made to a superior Court or a judge thereof for a writ of prohibition to be addressed to a judge of a county court, the matter shall be finally disposed of by rule or order, and ★ no [★482] declaration or further proceedings in prohibition shall be allowed," does not take away the right of appealing in such a case from a Divisional Court to the Court of Appeal: it only relates to procedure (*o*).

As to the effect of an order *nisi* or a summons for a prohibition, and as to the course to be pursued by the party who obtains the writ of prohibition, vide *post*, pp. 488, 489, 496.

5. Other Courts and Public Bodies.

Quarter Sessions.

A prohibition was issued to quarter sessions to stay further proceedings on an appeal which had not been commenced within the time limited by statute (*p*).

Liverpool Court of Passage.

A prohibition was granted to restrain the Liverpool Court of Passage from further proceeding on an order made by its registrar, requiring a plaintiff to give security for costs on the ground that his action was frivolous and vexatious; the rule of practice enabling the registrar to make such order being held invalid and not in exercise of the power given by sect. 4 of 6 & 7 Wm. 4, c. cxxxv. (*q*).

Salford Hundred Court.

A defendant in the Salford Hundred Court of Record cannot move for a prohibition unless he has pleaded the want of jurisdiction (*r*).

(*k*) See Jones *v.* James, 19 L. J. Q. B. 257. Cf. Winsor *v.* Dunford, 18 L. J. Q. B. 14.

(*l*) Mouflet *v.* Washburn, 54 L. T. N. S. 16.

(*m*) Jackson *v.* Beaumont, 11 Ex. 300. See also Ricardo *v.* Maidenhead Local Board of Health, 2 H. & N. 257.

(*n*) And see 39 & 40 Vict. c. 59, s. 20.

(*o*) Barton *v.* Titmarsh, 49 L. J. Q. B. 573; 42 L. T. N. S. 610.

(*p*) *Ex parte* Overseers of Everton, L. R. 6 C. P. 245. See also Ricardo *v.* Maidenhead Local Board of Health, 2 H. & N. 257.

(*q*) R. *v.* Mayor, &c., of Liverpool, 56 L. T. N. S. 314.

(*r*) Chadwick *v.* Ball, L. R. 14 Q. B. D. 855; overruling Oram *v.* Brearey, L. R. 2 Ex. D. 346.

Justices.

An application for a prohibition to justices was made (in a case where they had convicted for unlawfully taking fish in a private fishery), on the ground that the applicant had asserted a public right of fishery, and demanded production of the alleged owner's title deeds, which the magistrates refused; and reliance was placed on the following language attributed to Lord Holt (*s*): "Now this conviction is come hither [on certiorari] no prohibition can go; whereas, upon putting in such a suggestion as this while the conviction remained below, the parties might have a prohibition after conviction, to stay the justice from proceeding upon it;" to which Lord Denman replied: "No other judge ever said so, and I doubt whether Lord Chief Justice Holt ever [★ 483] said so;" and the ★ Court refused a prohibition; as the justices had, under 7 & 8 Geo. 4, c. 29, s. 34, jurisdiction to try the title of the informant (*t*).

Coroners.

A prohibition was granted to prevent a coroner from holding an inquisition respecting the origin of a fire (*u*), he having no *ex-officio* jurisdiction at common law to hold any other inquisition than one on a dead body, *super visum corporis* (*x*).

The Railway Commissioners.

A prohibition was granted to prevent the Railway Commissioners from enforcing orders requiring two companies to act jointly in doing what neither could do separately (*y*); also where they granted an injunction to restrain a railway company from making charges for the conveyance of passengers in excess of those authorized by their special Acts, but without any undue preference (*z*); also where they undertook an arbitration between two railway companies under sect. 8 of 36 & 37 Vict. c. 48, the specific difference between the two companies not being required or authorized by any general or special Act to be referred to arbitration (*a*); also where, a railway company having guaranteed to a canal company that if the income of the latter in any year was insufficient to pay a dividend of 4 per cent. the railway company would make up the deficiency, the commissioners, without the consent of the railway

(*s*) R. *v.* Burnaby, 2 Ld. Ray. 901.
(*t*) *Ex parte* Higgins, 10 Jur. 838; 8 Q. B. 149 note (*d*).
(*u*) R. *v.* Herford, 3 E. & E. 115.
(*x*) Id.
(*y*) Toomer *v.* London, Chatham and Dover Railway Co., L. R. 2 Ex. Div. 450.
(*z*) Great Western Railway Co. *v.* Railway Commissioners, L. R. 7 Q. B. D. 182; 50 L. S. Q. B. 483; 45 L. T. N. S. 206.
(*a*) Great Western Railway Co. *v.* Waterford, &c., Railway Co., L. R. 17 Ch. D. 493; 50 L. J. Chy. 513; 44 L. T. N. S. 723.

company, and without hearing it, made an order allowing through rates for goods traffic between two points, the effect of which would be to reduce the tolls of the canal company below the maximum allowed by its Acts, which tolls the canal company was prohibited from reducing or varying without the consent of the railway company (*b*).

A prohibition was also granted to stay further proceedings upon a taxation of costs ordered by the Commissioners to be paid by a successful defendant to an unsuccessful applicant (*c*).

The jurisdiction of the Commissioners to grant mandatory ★ injunctions compelling railway [★ 484] companies to afford all reasonable facilities for the receiving, forwarding, and delivering of traffic upon and from the several lines and canals belonging to or worked by them, was more recently very fully discussed by the Court of Appeal in the case of *South Eastern Railway Co.* v. *Railway Commissioners* (*d*), where the limits of their jurisdiction in this respect are pointed out.

Where remedy is by appeal and not prohibition.

To the general question "what would cause an order of the Commissioners, or part of it, to be beyond their jurisdiction, as distinguished from being erroneous?" Brett, L.J., thus replied: "If no part of the order could legally be made under any circumstances in any form, the whole is beyond jurisdiction. If there are separate parts which could under no circumstances in any form be legally made, those parts are beyond jurisdiction. But if the whole, or any part, could under some circumstances be properly made, though they would be improperly made under the circumstances of the particular case, that would be error and not excess of jurisdiction" (*e*).

(*b*) Warwick and Birmingham Canal Co. *v.* Birmingham Canal Navigation, L. R. 5 Ex. Div. 1.

(*c*) Foster *v.* Great Western Railway Co., 3 B. & M.'s Ry. Cas. 58.

(*d*) L. R. 6 Q. B. D. 586. The question of practice on demurrers, as to which Brett, L.J., dissented from the other members of the Court has now ceased to be of importance, vide *ante*, p. 416, and C. O. R. 137. Other examples of prohibition to the Railway Commissioners will be found in *Re* Wrexham, &c., Railway Co., 4 B. & M.'s Ry. Cas. 69; Halesowen Railway Co. *v.* Great Western Railway Co. and Midland Railway Co., id. 224; 52 L. J. Q. B. 473. See also Swansea, &c., Co. *v.* Swansea, &c., Railway Co., 3 N. & M.'s Ry. Cas. 339; Great Western Railway Co. *v.* Central Wales Railway Co., L. R. 10 Q. B. D. 231; 52 L. J. Q. B. 211; 48 L. T. N. S. 234; Huddersfield Corporation *v.* Great Northern Railway Co., 50 L. J. Q. B. 587.

(*e*) L. R. 6 Q. B. D. 599.

An erroneous decision by the Commissioners that there was some evidence of breach of sect. 2 of the Railway and Canal Traffic Act, 1854, would be an error in law on a matter within their jurisdiction, and not a ground for prohibition (*f*).

As to tithe commissioners and enclosure commissioners, vide *ante*, p. 433.

(*f*) Denaby, &c., Co. *v.* Manchester, &c., Railway Co., 3 N. & M.'s Ry. Cas. 426.

★CHAPTER IV. [★485]

PROCEDURE TO OBTAIN WRIT.

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By whom application may be made.

THE application for a prohibition may be made not only by either of the parties to the proceeding in the inferior Court (*a*), but also by a stranger (*b*), and even by a foreigner resident abroad (*c*); the reason being that where an inferior Court exceeds its jurisdiction, it is chargeable with a contempt of the Crown as well as a grievance to the party (*d*).

The party who has appealed to a Court of Appeal is not thereby precluded from applying for a prohibition (*e*).

Applications by strangers not interested in the subject-matter of the suit, or aggrieved by the excess of jurisdiction, have not been encouraged in recent times (*f*); except in the case of the Mayor's Court of the City of London.

★For separate suits against several indi- [★486] viduals, there should be separate applications for prohibitions (*g*).

(*a*) 2 Roll. Abr. 312; Worts *v.* Clyston, Cro. Jac. 350; Stransham *v.* Medcalfs, 1 Leon. 130.

(*b*) 2 Inst. 607; Com. Dig. Prohibition (E).

(*c*) See De Haber *v.* Queen of Portugal, 17 Q. B. 171, 214.

(*d*) *Per* Lord Campbell, 17 Q. B. 214, citing Ede *v.* Jackson, Fort, 345.

(*e*) Darby *v.* Cozens, 1 T. R. 552. See also *per* Littledale and Coleridge, JJ., in Chesterton *v.* Farlar, 7 A. & E. 718.

(*f*) See *per* Cockburn, C.J., R. *v.* Twiss, L. R. 4 Q. B. 413, and Forster *v.* Forster, 4 B. & S. 198, 203.

(*g*) Gerrard *v.* Sherrington, 1 Leon. 286; Kadwalader *v.* Bryan, Cro. Car. 162.

Against whom application may be made.

The application may be made either against the other party to the suit, or the judge to be prohibited or both. In modern practice the application in the first instance is made in form against the party and the Court; but it is usually the party, and very rarely the Court, that opposes the application (*h*).

A prohibition does not lie to the Sovereign or her executive officers for anything done by them as such (*i*), nor to a sheriff or other judicial officer in respect of any proceeding as to which he is completely *functus officio* (*k*).

Time.

As to the proper time for applying, vide *ante*, pp. 449, 453, 454.

Change in procedure.

A mere surmise or suggestion of the ground for prohibition was, at first, enough to put the superior Court in motion. And except in cases within 2 & 3 Ed. 6, c. 13 (*l*), the applicant was not bound to verify his suggestion or surmise before declaring in prohibition; but as this occasionally led to false surmises for the purpose of delay, the Courts so early as the time of Elizabeth, "took order that no prohibition should be granted upon such a surmise without great probability of the truth of the surmise" (*m*).

The practice fluctuated (*n*) till the time of Lord Holt, when it became the rule not to interfere upon a *bare* suggestion without a plea in the court below (*o*).

By the time of Lord Mansfield the practice so far [★ 487] as ★ concerned the Common Law Courts was established that, except in the cases where the Court below has no jurisdiction to deal with the matter at all, there must be either an affidavit or a plea in the Court

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(*h*) *Per* Willes, J., Mayor, &c., of London *v.* Cox, 2 E. & I. App. 280.

(*i*) See Chabot *v.* Morpeth, 15 Q. B. 446.

(*k*) Ib.

(*l*) This statute required the suggestion to be proved true by two honest and sufficient witnesses at the least, within six months after the granting the prohibition, and gave the defendant in prohibition an action for the recovery of double costs and damages, if the suggestion should not be proved true within the six months.

(*m*) *Per* Clench, J.. Wiggen *v.* Arscot, 2 Leon. 213.

(*n*) See Palmer *v.* Pope, Hob. 79 a, Anfild *v.* Feverill, 1 Roll. 61, Hildebrand's case, id. 285; Godfrey's case, Latch. 11; Bushel *v.* Jay, 1 Keb. 153; Green *v.* Colduck, id. 786; Waineman *v.* Smith, Sid. 464; Turner *v.* Weston, 2 Lutw. 1023; Burdett *v.* Newell, 2 Ld. Ray. 1211.

(*o*) The truth of the suggestion was traversable, and the Court would look into it, and see what foundation it had. See *per* Holt, C.J., Smith *v.* Wallett, Ld. Ray. 587; Peters *v.* Prideux, 3 Keb. 332; 2 Inst. 611.

below, either being sufficient (*p*); and the practice so remained up to the passing of 1 Wm. 4, c. 21, when it became necessary to have an affidavit in all cases. Sect. 1 of that Act, after reciting that "the filing a suggestion of record on application for a writ of prohibition is productive of unnecessary expense," enacts that "it shall not be necessary to file a suggestion on any application for a writ of prohibition, but such application may be made on affidavits only."

How application to be made.

According to No. 81 of the New Crown Office Rules, an application for a writ of prohibition on the Crown side is to be made by motion to a Divisional Court for an order *nisi* in all criminal causes or matters; and in civil proceeding on the Crown side by motion for an order *nisi* or by summons before a judge at chambers (*q*).

Before this rule a judge at chambers might, under 13 & 14 Vict. c. 61, s. 22 (amended by 38 & 39 Vict. c. 66), hear and determine applications for writs of prohibition to judges of county courts; and, under 15 and 16 Vict. c. lxxvii., s. 32, similar applications to the judge of the City of London Court; the decision of the judge at chambers being liable to be discharged, varied, or set aside by the Court.

The jurisdiction of a judge at chambers now embraces all civil proceedings on the Crown side.

No summons to shew cause before a judge at chambers is, in a case of prohibition, to be issued without the leave of a judge, upon an *ex parte* application (*r*).

Prohibitions are excluded from the jurisdiction of a master (*s*).

Affidavit.

The affidavit or affidavits should set forth, with sufficient detail, the circumstances shewing an absence or excess of jurisdiction on the part of the Court below; making an exhibit of the pleadings where there are any, and where there are no pleadings shewing ★how the question arose which ousts the [★ 488] jurisdiction of the inferior tribunal.

Except by leave of the Court or a judge, no order made *ex parte* founded on any affidavit shall be of any force unless the affidavit on which the application was made was actually made before the order was applied

(*p*) *Per* Willes, J., Mayor, &c., of London *v.* Cox, L. R. 2 E. & I. App. 288–290; referring to Buggin *v.* Bennett, 4 Burr. 2035; Driver *v.* Driver, Andr. 304; Hinds *v.* Thomson, Andr. 299; Caton *v.* Burton, Cowp. 330. See also Paxton *v.* Knight, 1 Burr. 307.

(*q*) C. O. R. 81.

(*r*) Id. 305.

(*s*) Order LIV., r. 12 (*g*).

for, and produced or filed at the time of making the motion (*t*).

The affidavit is to be entitled only "In the High Court of Justice, Queen's Bench Division" (*u*).

As to affidavits generally, and the rules of practice with reference to them, vide *ante*, pp. 41 *seq.*

Order *nisi*.

It is not necessary that the order *nisi* should state the ground of prohibition (*x*).

Service.—Where the order for a prohibition to a county court was directed to be served on the plaintiff and the judge, service on the judge and the attorney of the plaintiff was held insufficient (*y*).

Suspension.—Where an excess of jurisdiction was committed by a county court judge *per incuriam*, and the issue of a prohibition might be an obstacle to his proceeding to another judgment in the same matter, the order *nisi* for a prohibition was suspended, in order to allow of an application to the judge to strike out the judgment entered *per incuriam* and to proceed to a rehearing of the plaint (*z*).

Order *nisi* in the case of county courts.

In the case of county courts, the grant of an order *nisi* or a summons to shew cause why a writ of prohibition should not issue, shall, if the superior Court or a judge thereof so direct, operate as a stay of proceedings in the cause to which the same shall relate, until the determination of such rule or summons, or until such superior Court or judge shall otherwise order; and the judge of the county court shall from time to time adjourn the hearing of such cause to such day as he shall think fit until such determination or until such order be made. But if a copy of such rule or summons shall not be served by the party who obtained it on the [★ 489] ★opposite party and on the registrar of the county court two clear days before the day fixed for the hearing of the cause, the judge of the county court may, in his discretion, order the party who obtained the rule or summons to pay all the costs of the day, or so much thereof as he shall think fit, unless the superior Court or a judge thereof shall have made some other order respecting such costs (*a*).

The order may be made absolute *ex parte* in the first

(*t*) C. O. R. 24.

(*u*) C. O. R. 7. See Wallace *v.* Allan, 44 L. J. C. P. 351; *Ex parte* Evans, 2 D. N. S. 410; Breedon *v.* Capp. 9 Jur. 781.

(*x*) Eversfield *v.* Newman, 4 C. B. N. S. 418.

(*y*) Massey *v.* Burton, 3 Jur. N. S, 1108.

(*z*) Hoey *v.* McFarlane, 4 C. B. N. S. 718.

(*a*) 19 & 20 Vict. c. 108, s. 40.

instance on special circumstances being shewn, in the discretion of the Court or judge (*b*). Order absolute in first instance.

Cause is shewn on affidavit or otherwise as the circumstances of the case require. Shewing cause.

No person can shew cause against an order *nisi* unless he has previously obtained office copies of the order and of the affidavits upon which it was granted (*c*).

In the result the order *nisi* for a prohibition is ether discharged or made absolute, and with or without costs as to the Court seems just (*d*); or the Court may order the delivery of pleadings.

It is, according to Brett, L.J., not sufficient ground for discharging an order *nisi* that it asks for too extensive a prohibition; in such case the Court should mould the prohibition, and limit it to such part as is well founded (*e*).

There is now an appeal to the Court of Appeal from the grant of an order *nisi*, as well as from an order of the Divisional Court discharging or making absolute the order *nisi* (*f*). Appeal from grant or refusal of order.

19 & 20 Vict. c. 108, s. 42, does not take away, in cases of prohibition to county courts, the right of appeal to the Court of Appeal from the decision of a Divisional Court (*g*).

The rules of Order LVIII. of the Supreme Court Rules, 1883, are to apply to all civil proceedings on the Crown side including prohibition (*h*).

"Formerly, in order to take the opinion of a Court of Appeal it would have been necessary to have the applicant declare in prohibition, to which declaration the other side could plead, and then ★ the mat- [★ 490] ter being put on the record and disposed of in the court below, by judgment on the verdict, if the issues taken were issues in fact, or on demurrer if the issues taken were issues in law, error would lie on that judgment. Now there may be an appeal against the rule" (*i*).

The Court refused to allow a second application for a prohibition on new affidavits stating matter existing at the time of the former application (*k*). Renewed application.

(*b*) C. O. R. 82. (*c*) Id. 26.
(*d*) C. O. R. 300, Order LXV., r. 1.
(*e*) R. *v.* Local Government Board, L. R. 10 Q. B. D. 320.
(*f*) Jud. Act. 1873, s. 19. (*g*) Vide *ante*, pp. 481, 482.
(*h*) C. O. R. 216.
(*i*) *Per* Lord Blackburn, Mackonochie *v.* Lord Penzance, L. R. 6 App. Cas. 444. See also Barton *v.* Titmarsh, 49 L. J. Q. B. 573; 42 L. T. N. S. 610, and cf. the remarks of Lord Esher, M.R., cited *ante*, p. 380.
(*k*) Bodenham *v.* Ricketts, 6 N. & M. 537.

As to county courts, it is now provided by statute (*l*) that where a superior Court or judge has refused a prohibition, no other superior Court or judge shall grant it; but this is not to affect the right of appealing from the decision of the judge of the superior Court to the Court itself, or to prevent a second application to the same superior Court or the judge thereof on grounds different from those on which the first application was founded.

Setting aside writ.

It is obvious that a writ which issues out of the Petty Bag Office on a mere formal affidavit that the action in the inferior court is not within its jurisdiction, must often issue improvidently; in which case it may be set aside either by the Court on motion or by a judge at chambers (*m*).

Before the Judicature Acts the practice was to move before a single judge sitting in the Bail Court (*n*). It has now been held that since those Acts a judge at chambers has jurisdiction to set the writ aside (*o*).

Time for appealing against issue of writ at chambers.

Formerly when a judge at chambers granted a prohibition the rule was that an application to set aside [★ 491] his order should be made ★ not later than the end of the term next following the making of the order (*p*).

Now by rule 24 of Order LIV., in the Queen's Bench Division, every appeal to the Court from any decision at chambers is to be by motion, and must be made within eight days after the decision appealed against, or, if no Court to which such appeal can be made shall sit within eight such days, then on the first day on which any such Court may be sitting after the expiration of such eight days.

Motions.

As to motions generally, see the various rules set forth *ante*, pp. 72–74.

(*l*) 19 & 20 Vict. c. 108 s. 44.

(*m*) And it could be set aside either by the Court of Chancery or by a Court of Common Law. See *Re* Mayor, 1 Tur. & R. 314. The application in this case was that the prohibition issued might be set aside for irregularity, or that a writ of consultation might issue to the prohibited court.

(*n*) See Still *v.* Booth, 1 L. M. & P. 440, and Baddeley *v.* Denton, 7 D. & L. 210, where it was held that the insertion of the name and address of the suppliant's attorney in the book at the Petty Bag office, pursuant to 12 & 13 Vict. c. 109, s. 44, was not a condition precedent to obtaining a rule for a prohibition.

(*o*) Amstell *v.* Lesser, L. R. 16 Q. B. D. 187, following Salem Kyrburg *v.* Posnanski, L. R. 13 Q. B. D. 218.

(*p*) See Jordon *v.* Wilcoxon, 3 E. & B. 193.

★ CHAPTER V. [★ 492]

PLEADINGS AND SUBSEQUENT PROCEEDINGS.

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Pleadings.

WHERE pleadings in prohibition are ordered, the pleadings and subsequent proceedings, including judgment and assessment of damages, if any, are to be as nearly as may be the same as in an ordinary action for damages (*a*); that is, the party who would formerly declare in prohibition will deliver a statement of claim, setting forth the facts (without the evidence in support of them) on which the claim to a prohibition is based (*b*); the defendant, in like manner, setting forth in a statement of defence the grounds why the writ should be refused, including any objections of law which would formerly have been raised by demurrer (*c*); the plaintiff replying, &c.

Previously to 1 Wm. 4, c. 21, the defendant could not plead more than one plea, as the sovereign, being a party to the suit, was not bound by the statute of Anne; but since that statute (enacting that the "declaration shall be expressed to be on behalf of such party only, and not, as heretofore, on the behalf of the party and of his majesty") the defendant was allowed to plead several pleas (*d*).

See the rules as to pleading set forth *ante*, pp. 181–184.

None in case of prohibition to county courts.

★ In the case of prohibitions to county [★ 493] courts, the matter is to be finally disposed of by rule or order, and no further proceedings in prohibition are to be allowed (*e*).

(*a*) C. O. R. 137.
(*b*) Order XIX., r. 4.
(*c*) Order XXV., rr. 1, 2.
(*d*) Hall *v.* Maule, 5 N. & M. 455; 4 A. & E. 283.
(*e*) 19 & 20 Vict. c. 108, s. 42.

What pleadings must shew.

Whatever is necessary to shew a jurisdiction in the inferior court should be expressly stated, because the "rule for jurisdiction is that nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged" (*f*). And it is an unquestioned rule that "inferior courts and proceedings by magistrates the maxim *omnia præsumuntur rite esse acta*, doth not apply to give jurisdiction" (*g*).

A further distinction between the superior Court and an inferior tribunal is this, that whoever pleads to the jurisdiction of the superior Court must shew what other Court has jurisdiction (*h*), and that the defendant dwelt there or had whereby to be attached there (*i*), so as to shew that the exercise of the general superintending jurisdiction of the superior Court is unnecessary; but such a form of plea would be unnecessary and out of place in an inferior court, and also in the superior court, when the objection is that the limits of a local jurisdiction are transgressed (*k*).

Declaring in prohibition.

In nice and difficult cases it was usual to direct the plaintiff to declare on his prohibition, and so proceed to issue, that the merits of the case might be brought before the Court with the greater exactness, and they thereby might be the better enabled to judge of the reasonableness of granting or refusing the prohibition (*l*).

The action was in form to recover damages for proceeding after a writ of prohibition had been obtained and delivered to the defendant; but as the plaintiff would have no ground to complain of the proceeding after writ of prohibition delivered, as an injury to [★ 494] ★ him (though it might be a contempt against the sovereign), unless he could shew that the writ had issued properly, and that he had a just right to claim the benefit of it, this went at once to all the

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(*f*) Peacock *v.* Bell, 1 Wms. Saund. 101, n., cited with approval, L. R. 2 E. & I. App. 259. Cf. Trevor *v.* Wall, 1 T. R. 151; Williams *v.* Gibbs, 5 A. & E. 208.

(*g*) *Per* Holroyd, J., R. *v.* All Saints, Southampton, 7 B. & C. 785; R. *v.* Bolton, 1 Q. B. 66; Chew *v.* Holroyd, 8 Exch. 249.

(*h*) R. *v.* Johnson, 6 East, 583.

(*i*) Smith *v.* Sephton, Comb. 115.

(*k*) *Per* Willes, J., L. R. 2 E. & I. App. 260, 261, and authorities there referred to.

(*l*) Bac. Abr. Prohib. F. referring to Ld. Ray. 236; Cro. Eliz. 736; 4 Mod. 151, 152; Lev. 125; Ray. 88; Stile's Pract. Leg. 473.

merits of the prohibition, and made the legal ground of it the gist of the action; in which action, in the shape of a question whether such a prohibition as was moved for ought to *have been* granted, and the real question, namely, whether such a prohibition ought *to be* granted, was solemnly considered and determined (*m*).

The action cannot, like an ordinary action, be resorted to as a matter of course, but only by direction of the prohibiting Court; and then not without the concurrence of the defendant, who may allow the prohibition to go in the first instance without even the expense of shewing cause (*n*).

The action is in effect nothing more than an issue directed in a disputed case, only to inform the conscience of the Court whether the Court below has power to proceed; both parties are actors, and no damages can be recovered therein, unless the plaintiff in the inferior court proceeds after a previous prohibition (*o*).

Order to plead is discretionary.

As the declaration in prohibition was for the purpose of informing the conscience of the Court, that is to say, of making the Court clear, in case of doubt, as to the law or the facts or both, it follows that, where the Court is already clear, it may issue its writ without directing any further step to be taken by pleadings or otherwise (*p*).

It was contended in a modern case (*q*) that if the Court be about to prohibit, the defendant in prohibition has a right to an order of the Court to the plaintiff in prohibition, calling upon him to declare in prohibition; on the authority of certain dicta to that effect of Lord Mansfield and Lord Denman, the former in the case of *St. John's College* v. *Teddington*, as reported in 1 Burr. 198, and the latter in the case of *Remington* v. *Dalby*, as reported in 9 Q. B. 476; but the Court held that no such right exists, and that it is always in the discretion of the Court to say whether the plaintiff ★ in prohibition shall or shall not be put to [★ 495] declare; and that when the Court is clear, both in fact and law, that the inferior Court is acting in excess of or without jurisdiction, the writ of prohibition should issue without the plaintiff in prohibition being put to declare.

(*m*) *Per* Eyre, C.J., Home *v.* Camden, 2 H. Bl. 533, 534.

(*n*) *Per* Willes, J., Mayor, &c., of London *v.* Cox, L. R. 2 E. & I. App. 278; referring to Pewtress *v.* Harvey, 1 B. & Ad. 154.

(*o*) *Per* Willes, J., *ubi supra*, referring to Buller's N. P. 219, and White *v.* Steele, 13 C. B. N. S. 231, 234.

(*p*) See L. R. 10 C. P. 385.

(*q*) Worthington *v.* Jeffries, L. R. 10 C. P. 379.

In the judgment it is pointed out that the dicta of Lord Mansfield and Lord Denman, as contained in the reports above referred to, are differently reported elsewhere (*r*), and acknowledge in the defendant only "a sort of right;" and in both cases, and in the cases which were then arising before the Courts, where the jurisdiction claimed, being that of a proprietary court, was a valuable property, and where each jurisdiction claimed was by virtue of a different grant, it seemed appropriate to say that the person whose jurisdiction was attacked had almost a right, or a sort of right, to have the matter discussed in the most solemn form, and subject to appeal (*s*).

In two other cases the expressed opinion of Lord Denman was that, where the Court entertained no doubt, it would not put the complainant to declare in prohibition (*t*); and in a later case (*u*) Lord Campbell, delivering the judgment of the Court, said: "If we had entertained any grave doubt upon the subject, we should have directed the applicant to declare in prohibition; but being clearly of opinion that there is an excess of jurisdiction in the court below, of which he is entitled to complain before us, it is our duty simply to make the rule absolute." Though the application in these cases was made by the Court below, it is, as observed by Brett, J. (*x*), impossible that such phraseology, without any notice of any distinction, would have been so often used if the suggested right had existed (*y*).

[★ 496] ★ There is now less need than before for any pleadings in prohibition, as since the Judicature Acts an appeal lies from every order of the High Court of Justice to the Court of Appeal, and thence to the House of Lords; and if all the materials requisite for deciding the case are brought before the Court on the

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(*r*) St. John's College *v.* Teddington, as reported *nom.* R. *v.* Ely, 1 W. Bl. 81; and Remington *v.* Dalby, as reported in 14 L. J. Q. B. 6.

(*s*) L. R. 10 C. P. 386.

(*t*) Chancellor, &c., of Oxford *v.* Taylor, 1 Q. B. 974, note (*a*); *Re* Dean of York, 2 Q. B. 40, 41; Church *v.* Inclosure Commissioners, 11 C. B. N. S. 682.

(*u*) De Haber *v.* Queen of Portugal, 17 Q. B. 220.

(*x*) L. R. 10 C. P. 387.

(*y*) In the opinion of the judges given to the House of Lords in Home *v.* Camden (2 H. Bl. 534, 535), by Eyre, C.J., it is said: "So long as the temporal Courts direct parties to declare in prohibition, a prohibition cannot arbitrarily issue, nor upon any but the most solid and substantial grounds, &c." See also *per* Lord Kenyon in Smart *v.* Wolff, 3 T. R. 340.

argument of the order *nisi*, no advantage can arise from pleadings in prohibition (*z*).

Trial.

As to the various proceedings up to and including the trial, vide *ante*, pp. 189 *et seq.*

New trial.

As to a new trial, the mode of obtaining it and the grounds on which it is granted, vide *ante*, pp. 88, 89.

Appeal.

To Court of Appeal.—As to appeals to the Court of of Appeal, vide *ante*, pp. 210–213.

To House of Lords.—As to appeals to the House of Lords, vide *ante*, pp. 106, 107.

Issue of writ of prohibition.

As to the mode of preparing, testing, issuing, &c., the writ of prohibition, see the various rules set forth *ante*, pp. 378–381.

Form of writ.

A form of writ of prohibition will be found in the Appendix.

Procedure when writ issues to county court.

Where a writ of prohibition addressed to a judge of a county court is granted by a supreme Court, or a judge thereof, on an *ex parte* application, the party who obtains it should lodge it with the registrar and give notice to the opposite party that it has been issued, two clear days before the day fixed for hearing the cause to which it shall relate (*a*).

If in doing so default is made by the party who obtains the writ, the judge of the county court may, in his discretion, order him to pay all the costs of the day, or so much therof as he shall think fit, unless the Supreme Court or a judge shall have made some order respecting such costs (*b*).

Execution.

Although by No. 137 of the New Crown Office Rules it is not provided, as in the corresponding rules (Nos. 134, 136) relating to *quo warranto* and mandamus, that execution following upon pleadings in prohibition is to be had as in an action (*c*), yet by No. 216 of the same rules, Order XLII. of the Supreme Court Rules, 1883, relating to execution, is, so far as it is applicable, made to apply to ★ all civil proceedings on the [★ 497] Crown side, amongst which prohibition is included.

See the various rules of Order XLII. set forth *ante*, pp. 214–220.

An attachment for disobedience to a writ of prohibition may issue against both judge and party; and a party may be attached not only for persisting in the

(*z*) See *per* Lord Blackburn, L. R. 6 App. Cas. 444.
(*a*) 19 & 20 Vict. c. 108, s. 41.
(*b*) Id.
(*c*) Cf. C. O. R., rr. 134, 136, 137.

cause prohibited, but also for instituting a new suit for the same thing (*d*).

As to attachment for contempt, see C. O. RR. 261 *et seq.*

Costs. 1 Wm. 4, c. 24, s. 1, enacted that "the party in whose favour judgment shall be given, whether on non-suit, verdict, demurrer, or otherwise, shall be entitled to the costs attending the application and subsequent proceedings, and have judgment to recover the same."

This was held by Patteson, J. (*e*), not to apply to a case where the rule for a prohibition was made absolute without pleadings; following the old practice under 8 & 9 Wm. 3, c. 11, s. 3 (*f*). This decision was followed in a recent case (*g*), Bovill, C.J., remarking that the Act does not apply except where there is a judgment in the legal sense of the word, that is on pleadings."

But though the Court is not bound to award costs on making absolute or discharging the order, it may do so if it thinks proper (*h*).

Costs incurred by the plaintiff in prohibition, in his defence to the suit in the inferior Court, were held not to be recoverable as damages under 1 Wm. 4, c. 21 (*i*).

Order LXV. of the Supreme Court Rules and Orders, 1883, as to costs is now, so far as it is applicable, to apply to all civil proceedings on the Crown side (*j*).

See the various rules of this Order set forth *ante*, pp. 207 *seq.*

On the proper interpretation of Order LV., giving the Court what is called an absolute discretion as to costs, see the judgment of Lord Justice James in *Witt* v. *Cor-*
[★ 498] *coran* (*k*); the judgments of ★ Lords Justices Brett and Cotton in *Foster* v. *Great Western Railway Co.* (*l*), and per Jessel, M.R., in *Dicks* v. *Yates* (*m*).

Consultation. If after issue of the writ of prohibition it was made to appear to the Court that it ought not to have issued, a consultation was awarded, *i.e.*, a writ in the nature of a *procedendo*, addressed to the prohibited Court, signifying to and commanding it that it might lawfully pro-

(*d*) See Stafford's case, 1 Leon. 111; Sharington *v.* Fleetwood, Moore, 599; Bro. Attachment sur Prohibition, pl. 3, 5, 7, 9, 11. F. N. B. 40. (*k*).
(*e*) R. *v.* Kealing, 1 Dowl. 440.
(*f*) See Pewtress *v.* Harvey, 1 B. & Ad. 154.
(*g*) *Ex parte* Overseers of Everton, L. R. 6 C. P. 245.
(*h*) Wallace *v.* Allen, L. R. 10 C. P. 607.
(*i*) White *v.* Steele, 13 C. B. N. 231.
(*j*) C. O. R. 300.
(*k*) L. R. 2 Ch. D. 69.
(*l*) L. R. 8 Q. B. D. 518 *seq.*
(*m*) L. R. 18 Ch. D. 76.

ceed in the cause notwithstanding the prohibition. This writ of consultation owed its origin to the *Statutum de Consultatione* of 18 Ed. 1 (*n*), which in terms refers only to ecclesiastical courts; but it became the practice to grant it also to temporal courts of inferior jurisdiction (*o*).

It was provided by 50 Ed. 3, c. 4, that once a consultation had been duly granted the ecclesiastical judge might proceed, notwithstanding any other prohibition, provided that the matter of the libel was not enlarged or otherwise changed. But this was held to apply only where the consultation had been granted on the merits of the thing in question, and not for mere defects of form (*p*). It could not be granted out of term, nor by any judge out of court (*q*).

This was formerly, after the writ had issued, the only method of questioning its propriety; for a writ of error did not lie to the Exchequer Chamber (*r*), or to the House of Lords (*s*).

(*n*) Sometimes also attributed to the 24th year of Ed. I.

(*o*) See a writ addressed to the Earl Marshal, 2 Lilley's Entries, 562.

(*p*) Cox *v.* Semor, Yelv. 102; Stroud *v.* Hoskins, Cro. Car. 208; Sir W. Jones, 231; Pool *v.* Gardner, Carth. 463.

(*q*) Fuller's case, 12 Rep. 42.

(*r*) Free *v.* Burgoyne, 5 B. & C. 765.

(*s*) Bishop of St. David *v.* Lucy, 1 Ld. Ray. 539.



★APPENDIX. [★499]

FORMS.

NOTICE TO A JUSTICE OF THE PEACE OF INTENTION TO APPLY FOR A CRIMINAL INFORMATION.

To *A. B.*, Esquire, one of her Majesty's Justices assigned to hear and determine divers crimes, trespasses, and other offences committed within the county of .

Take notice, that the Queen's Bench Division of her Majesty's High Court of Justice will be moved on the day of , or so soon after as counsel can be heard on behalf of C.D., for an order to shew cause why an information should not be exhibited against you for certain misdemeanors, in unlawfully, maliciously, and corruptly, and contrary to your duty as such justice of the peace [*here set out the nature of the offence*].

Dated, &c.

(Signed)
H.I.,
Solicitor for the said C.D.

Notice to several Justices.

Commence, as above, and continue why one or more information or informations should not be exhibited against you or some or one of you, &c., as above.

[No. 29 of Crown Office Forms, 1886.].

AFFIDAVIT OF SERVICE OF NOTICE.

In the High Court of Justice,
Queen's Bench Division.

[*When in a cause on the Crown side of the Court, insert the title of the cause, but not otherwise.*]

I, *A.B.*, of &c., make oath and say :—

1. That I did on the day of , serve *C.D.*, one of the persons to whom the notice hereunto annexed is directed, with the ★ said notice, by delivering a copy of the said [★500] notice to , and leaving the same with [*the wife, clerk, or servant of*] the said at the residence of the said , situate at in the county of . When not personal.

2. That I did on the day of , also serve *E.F.*, another of the persons to whom the said notice is directed, with When personal.

the said notice, by delivering a copy of the said notice personally to the said at , in the county of .
Sworn, &c.

[C. O. Forms, 199.]

ORDER NISI FOR A CRIMINAL INFORMATION.

The day of , A.D.
In the High Court of Justice,
Queen's Bench Division.

Yorkshire. } Upon reading [the several affidavits of and , and the paper writing thereto annexed, and also part of a printed paper annexed beginning with the words , and ending with the words], It is ordered, that day of , in these sittings [*or* as the case may be], be given to *J.S.* to shew cause why an information should not be exhibited against him for certain misdemeanors [*adding in libel cases*, "in printing and publishing certain scandalous libels"], upon notice of this order to be given to him the meantime.

On the motion of Mr. .
By the Court.

AFFIDAVIT OF PERSONAL SERVICE OF ORDER.

[*Heading as in Affidavit of Service of Notice.*]

I, *A.B.*, of &c., make oath and say :—
That I did on the day of , 188 , personally serve *C.D.* mentioned in the order hereunto annexed, with the said order, by delivering a true copy of the said order to the said *C.D.* personally at , in the county of . And at the same time shewing to the said *C.D.* the said original order.
Sworn, &c.

[C. O. Forms, 200.]

[★501] AFFIDAVIT OF SERVICE OF ORDER NOT PERSONAL.

[*Heading as in last.*]

I, *A.B.*, of &c., make oath and say :—
That I did on the day of 188 , serve *C.D.* mentioned in the order hereunto annexed, with the said order, by delivering a true copy of the said order to , and leaving the same with [*the wife, clerk or servant*] of the said *C.D.*, at the dwelling-house [*or* office] of the said *C.D.* situate at , in the county of . And at the same time shewing to the said the said original order.
Sworn, &c.

[C. O. Forms, 201.]

ENLARGED ORDER FOR A CRIMINAL INFORMATION.

day the day of , A.D. 188 .
In the High Court of Justice,
Queen's Bench Division.

Lancashire. } Upon [reading the affidavits of and upon] hearing counsel on both sides, It is ordered that the day of the next sittings [*or*, whatever day is fixed] be further given to, to shew case why an information should not be exhibited against him for certain misdemeanors [in printing and publishing, &c., *or* as the case may be] ; the said hereby undertaking, in case the said information shall be exhibited, to appear and plead thereto within [four] days afterwards, or in default that the prosecutor may sign judgment against him for want of a plea ; and it is further ordered that all affidavits to shew cause be filed before the day of shewing cause.

Mr. , for the prosecutor.
Mr. , for the defendant.
By the Court.

ORDER DISCHARGING ORDER NISI FOR A CRIMINAL INFORMATION.

The day of , A.D.

London. The Queen, on the prosecution of A. B., Esq., against C. D. } Upon hearing counsel on both sides, It is ordered that [upon payment of all costs (*sometimes as between solicitor and client*), by the defendant to the prosecutor or his solicitor, *or* as the case may be] the order made the of last, that the said *C.D.* should shew ★ cause why an [★ 502] information should not be exhibited against him for certain misdemeanors [in printing and publishing certain scandalous libels] be discharged.

Mr. , for the prosecutor.
Mr. , for the defendant.
By the Court.

ORDER ABSOLUTE FOR A CRIMINAL INFORMATION.

The day of , A.D.

Yorkshire. } Upon reading the several affidavits of [*A.B.*, *C.D.*, &c., and the paper writing thereto annexed], and upon hearing counsel on both sides, It is ordered, That an information be exhibited against *J.S.* for certain misdemeanors [*in libel cases say*, "in printing and publishing certain scandalous libels."]

Mr. , for the prosecutor.
Mr. , for the defendant.
By the Court.

RECOGNIZANCE TO PROSECUTE INFORMATION (CRIMINAL).

Be it remembered, that on the day of , 188 , before Frederick Cockburn, Esquire, Queen's coroner and attorney, in the Queen's Bench Division of Her Majesty's High Court of

Justice, before the Queen herself, cometh *A.B.* (*the prosecutor*) of &c., and acknowledges to owe to *C.D.* [*the defendant*] the sum of fifty pounds upon condition to prosecute with effect a certain information exhibited against the said *C.D.* by the said coroner and attorney, before the Queen herself, in the said Court for certain misdemeanors, and abide by and observe all such orders and things as the said Court shall direct in that behalf.

Taken, &c.

(Signed)
F. COCKBURN,
(Queen's coroner and attorney).
(C. O. Forms, 27.)

CRIMINAL INFORMATION NOT EX-OFFICIO.

Middlesex, *to wit.*

Be it remembered, that Frederick Cockburn, Esquire, coroner and attorney of our present Sovereign Lady the Queen, in the Queen's Bench Division of Her Majesty's High Court of Justice, [★ 503] before the ★ Queen herself, who for our said Lady the Queen in this behalf prosecutes in his own proper person, comes here into Court, before the Queen herself, at the Royal Courts of Justice, London, on [*the day the order was made absolute*]. And for our said Lady the Queen gives the Court here to understand and be informed, that [*state offence and then proceed in the same manner as if it were an indictment*].

Second Count.—And the said coroner and attorney of our said Lady the Queen, for our said Lady the Queen, further gives the Court here to understand and be informed that, &c.

[*To conclude.*]

Whereupon the said coroner and attorney for our said Lady the Queen prays the consideration of the Court here in the premises, and that due process of law may be awarded against him, the said *B. G.*, in this behalf to make him answer to our said Lady the Queen touching and concerning the premises aforesaid.

(Signed)
F. COCKBURN,
(Queen's Coroner and Attorney).
[C. O. Forms, 30.]

INFORMATION EX-OFFICIO.

Information by the Attorney General or Solicitor General, ex officio.

In the same form, using the name of the Attorney General [or *Solicitor General*] *instead of the Queen's coroner and attorney, thus*—Sir *A.B.*, Knight, Attorney General [*or* Sir *C.D.*, Knight, Solicitor General] of our present Sovereign Lady the Queen, who for our said Lady the Queen in this behalf prosecutes, whereupon, &c, the said Attorney General, &c., *as in the prayer.*

[C. O. Forms, 31.]

INFORMATION FOR A SEDITIOUS LIBEL.

[Commencement as before.]

That Sir F. Burdet, late of Westminster, in the county of Middlesex, Baronet, being a seditious, malicious, and ill-disposed person, and unlawfully and maliciously devising and intending to raise and excite discontent, disaffection, and sedition among the liege subjects of our Lord the present King, and amongst the soldiers of our said Lord the King, and the more to excite the liege subjects of our said ★ Lord the King to hatred [★ 504] and dislike of the Government of this realm, and to insinuate and cause it to be believed by the liege subjects of our said Lord the King, that divers of the liege subjects of our said Lord the King had been inhumanly cut down, maimed, and killed by certain troops of our said Lord the King, heretofore, to wit, on &c., at Loughborough, in the county of Leicester, unlawfully and maliciously did compose, write and publish, and cause to be composed, written, and published, a certain scandalous, malicious, and seditious libel of and concerning the Government of this realm, and of and concerning the said troops of our said Lord the King, according to the tenor and effect following [*that is to say*]: "To the Electors of Westminster. Gentlemen, on reading the newspapers this morning, &c. What! kill men unarmed, unresisting! and, gracious God, women too disfigured, maimed, cut down, and trampled on by dragoons (meaning the said troops of our said Lord the King, and meaning thereby that divers liege subjects of our said Lord the King had been inhumanly cut down, maimed, and killed by our said Lord the King). Is this England," &c., in contempt of our said Lord the King and his laws, to the evil example of all others and against the peace of our said Lord the King, his Crown and dignity.

[Conclusion as before.]

[From *R.* v. *Burdett*, 4 B. & A. 115–117. See also *R.* v. *Lambert and Perry*, 31 How. St. Trials, 335; and 2 Chitt. Cr. L. 890.]

EX-OFFICIO INFORMATION FOR AN OBSCENE LIBEL.

Middlesex, *to wit.*

"That late of being a person of a wicked and depraved mind and disposition, and most unlawfully, wickedly, and impiously devising, contriving and intending to vitiate and corrupt the morals of all the subjects of our said present Sovereign Lady the Queen, and to debauch, poison and infect the minds of the youth of this kingdom, and to bring them into a state of wickedness, lewdness, debauchery and impiety, on &c., at &c., did unlawfully, wickedly, and impiously publish and sell, and cause and procure to be published and sold, a certain wicked, nasty, filthy, bawdy, impious and obscene libel, entitled , in which said libel are contained, amongst other things, divers wicked, false, feigned, lewd, impious, impure, gross, bawdy and obscene matters, that is to say, in one part thereof, according to the tenor following, viz. [*here set out libel*]. And in another part thereof, according to the tenor following, viz. [*here set out the other libellous part*] to the high displeasure of Almighty God, to the scandal and reproach of the Christian religion, in contempt of our said Lady the Queen and ★ her laws, [★ 505] and to the great offence of all civil governments, to the evil and pernicious example of all others in the like case offending, and

First count.

against the peace of our said Lady the Queen, her Crown and dignity.

Second count. "And the said Attorney-General of our said Lady the Queen, who for our said Lady the Queen in this behalf prosecutes, further gives the Court here to understand and be informed, that the said , being such person as aforesaid, and most unlawfully, wickedly and impiously devising, contriving and intending as aforesaid, and the sooner to accomplish, perfect and bring to effect his said most unlawful and wicked purposes, afterwards, that is to say on &c., at &c., did unlawfully, wickedly and impiously publish and sell, and cause and procure to be published and sold, a certain other wicked, nasty, filthy, bawdy, impious and obscene libel entitled , in which said last-mentioned libel are contained, amongst other things, divers wicked, false, feigned, lewd, impious, impure, unnatural, bawdy and obscene prints, representing and exhibiting men and women with their private parts, in most indecent postures and attitudes, and representing men and women in the act of carnal copulation, in various attitudes and postures, and also representing and exhibiting men in the act of committing the detestable crime of sodomy, to the high displeasure, &c."

[Conclusion as before.]

[Adapted from indictment 2 Chitt. Cr. L. 44.
See also 3 Chitt. C. L. 887.]

EX-OFFICIO INFORMATION FOR A BLASPHEMOUS LIBEL.

Middlesex, *to wit.*

First count. "That Daniel Isaac Eaton, late of , bookseller, being an evil-disposed and wicked person, and disregarding the laws and religion of this realm, and wickedly and profanely intending to bring the Holy Scriptures and the Christian religion into disbelief and contempt among all the liege subjects of our said Lord the King, did heretofore, to wit on the &c., at &c., unlawfully and wickedly print and publish, and cause to be printed and published, a certain scandalous, impious, and blasphemous and profane libel of and concerning the Holy Scriptures and the Christian religion, containing therein, amongst other things, divers scandalous, impious, blasphemous and profane matters of and concerning the Holy Scriptures and the Christian religion, in one part thereof according to the tenor and effect following (that is to say): 'But the case is, that people have been so long in the habit of reading the books called the Bible (meaning that part of the Holy Bible called the Old Testament) and Testament (meaning the New Testament) with their eyes shut,' &c. And [★ 506] in another part thereof ★ according to the tenor and effect following (that is to say), 'I forbear making any remark on this abominable imposition of Matthew (meaning the Holy Evangelist Saint Matthew), the thing glaringly speaks for itself,' &c. To the high displeasure of Almighty God, to the great scandal of the Christian religion, to the evil example of all others, and against the peace of our said Lord the King, his crown and dignity.

Second count. And the said Attorney-General of our said Lord the King, who for our said Lord the King in this behalf prosecutes, further gives the Court here to understand and be informed, that the said Daniel Isaac Eaton further impiously and profanely devising and intending as aforesaid, did afterwards, to wit, on the same day

and year aforesaid, at London aforesaid, in the parish and ward aforesaid, unlawfully and wickedly print and publish, and cause to be printed and published, a certain other scandalous, impious, blasphemous and profane libel of and concerning the Holy Scriptures and the Christian religion, to the tenor and effect following (that is to say), &c. Whereupon the said Attorney-General, &c.

[Conclusion as before.]

[2 Chitt. Crim. L. 14.]

FOR A LIBEL (IN A FOREIGN TONGUE) ON A FOREIGN RULER.

[Commencement as before.]

"That before and at the time of the printing and publication of the scandalous, malicious and defamatory libels and libellous matters and things hereinafter next mentioned, there subsisted and now subsists friendship and peace between our sovereign Lord the King and the French Republic, and the subjects of our said Lord the King and the citizens of the said republic, and that before and at those times citizen Napoleon Bonaparte was and is yet first consul of the said French Republic, and as such the chief magistrate of the same [*to wit, at the parish of St. Anne, within the liberty of Westminster, in the county of Middlesex*], and the said Attorney-General of our said Lord the King further giveth the Court here to understand and be informed that Jean Peltier, late of Westminster, in the county of Middlesex, gentlemen, well knowing the premises aforesaid, but being a malicious and ill-disposed person, and unlawfully and maliciously devising and intending to traduce, defame and vilify the said Napoleon Bonaparte, and to bring him into great hatred and contempt, as well among the liege subjects of our said Lord the King as among the citizens of the said republic, and to excite and provoke the citizens of the republic by force and arms, to deprive the said Napoleon Bonaparte ★ of his consular office and magis- [★ 507] tracy in the said republic, and to kill and destroy the said *N. B.*; and also unlawfully and maliciously devising as much as in him the said Jean Peltier lay, to interrupt, disturb and destroy the friendship and peace subsisting between our said Lord the King and his subjects and the said *N. B.*, the French Republic, and the citizens of the same republic, and to excite animosity, jealously and hatred in the said *N. B.*, against our said Lord the King and his subjects, on &c., unlawfully and maliciously did print and publish, and cause and procure to be printed and published, a most scandalous and malicious libel, containing therein, amongst other things, divers scandalous and malicious matters in the French language, of and concerning the said *N. B.* (that is to say), in one part thereof to the tenor following, to wit, '*Quelle tempêtes*,' &c. [*here state a part of the libellous matter in French*] and in another part thereof to the tenor following, *i.e.*, '*Déjà dans sa rage*,' &c. [*here state another part of the libellous matter in French*] which said scandalous and malicious words in the French language, first above-mentioned and set forth, being translated into the English language were and are of the same signification and meaning as these English words following, viz., 'What frightful tempests,' &c. [*here set forth the translation*], and which said scandalous and malicious words in the French language last above-mentioned and set forth, being translated into the English language were and are of the same signification as these English

words following, that is to say, 'Already in his insolent rage the despot [*meaning the said Bonaparte*] desires,' [*here set forth the translation*], &c., to the great scandal, disgrace and danger of the said *N. B.*, the French Republic and the citizens of the said republic, to the evil example of all others in the like case offending, in contempt of our said Lord the King and his laws, and against the peace of our said Lord the King, his crown and dignity."

EX-OFFICIO INFORMATION FOR BRIBERY AT A PARLIAMENTARY ELECTION.

Kent, *to wit.*

First count. Be it remembered that , Knight, Attorney-General of our sovereign Lady the Queen, who for our said Lady the Queen prosecutes in this behalf, in his proper person comes here into Court before the Queen herself, at the Royal Courts of Justice, London, on the day of , in the year of our Lord 188 . And for our said Lady the Queen gives the Court here to understand and be informed that heretofore, to wit, on the day of in the year of our Lord 188 , at the borough of in the county of Kent, a certain election was had and held for [★ 508] the electing and choosing of a burgess ★ to serve in this present Parliament for the said borough of , and that before and at the time of the committing of the several offences hereinafter mentioned, *A. B.* was a candidate to be elected and returned at the said election as a burgess to serve in Parliament for the said borough of . And the said Attorney-General of our said Lady the Queen further gives the Court here to understand and be informed that *C. D.* was guilty of bribery at the said election against the form of the statute in that case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

Second count. And the said Attorney-General of our said Lady the Queen, for our said Lady the Queen, further gives the Court here to understand and be informed that heretofore and before the said election in the first count of this information mentioned was so had and held as therein mentioned, to wit, on the day of , in the year of our Lord 188 , the said *C. D.* unlawfully, wilfully and corruptly did advance and pay, and cause to be advanced and paid, to wit, to one *E. F.* certain money, to wit, the sum of £ , with the intent that such money or some part thereof should be expended in bribery at the said election, in contempt of our said Lady the Queen and her laws, to the evil example of all others in the like case offending, against the form of the statute in that case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

Third count. And the said Attorney-General, &c., that heretofore and before the said election in the first count in this information mentioned was so had and held as therein mentioned, to wit, on the day of , in the year of our Lord 188 , the said *C. D.* unlawfully, wilfully and corruptly did advance and pay, and cause to be advanced and paid, certain money, to wit, the sum of £ to the use of certain other persons, to wit *G. H.*, *I. J.*, &c., with the intent that such money, or some part thereof, should be expended, to wit, by the persons aforesaid, in bribery at the said election, in contempt, &c.

Fourth count. And the said Attorney-General, &c., that heretofore and before

the said election in the first count of this information mentioned was so had and held as therein mentioned, to wit, on the day of , in the year of our Lord 188 , the said *C. D.* unlawfully, wilfully and corruptly did directly by himself give and agree to give certain money, to wit, £ to a certain person, to wit, *K. L.*, then being a voter having a right to vote at the election aforesaid, in order to induce the said *K. L.* to vote at the said election; against the form of the statute in that case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

Fifth count. And the said Attorney-General, &c., that heretofore and before the said election in the first count of this information mentioned, was so had and held as therein mentioned, to wit, on the day of , ★ in the year of our Lord 188 , and on [★ 509] divers days and at divers time, both before that day and before and at the time of the said election was had and held as aforesaid, to wit, at the said borough of , the said *C. D.* with *E. F.*, *M. N.*, *X. Y.*, and divers other persons whose names are to the said Attorney-General unknown, did unlawfully and wickedly conspire, combine, confederate and agree to commit bribery at the said election, in contempt of our said Lady the Queen, &c.

Sixth count. And the said Attorney-General, &c., that heretofore and before the said election in the first count of this information mentioned was so had and held as therein mentioned, to wit, on the day of , in the year of our Lord 188 , and on divers days and at divers times before and at the time the said election was so had and held as aforesaid, to wit, at the said borough of , the said *C. D.*, with one *E. F.*, and divers other persons whose names to the said Attorney-General are unknown, unlawfully and wickedly did conspire, combine, confederate and agree unlawfully and corruptly, to procure the said *A. B.*, so then being a candidate to be elected and returned at the said election, as in the first count of this information mentioned, to be thereat elected and returned by bribery at the said election, to the evil example of all others in the like case offending, and against the peace, &c.

Seventh count. And the said Attorney-General, &c., that heretofore &c., to wit, on the day of , in the year of our Lord 188 , and on divers days and at divers times before, both before and at the time the said election was so had and held as aforesaid, to wit, at the said borough of , the said *C. D.*, with one *E. F.*, and divers other persons whose names to the said Attorney-General are unknown, unlawfully and wickedly did conspire, combine, confederate and agree to bribe and cause to be bribed, divers persons whose names to the said Attorney-General are unknown, these being persons having respectively a right to vote at the said election of a burgess to serve in Parliament for the said borough of corruptly to give their votes at the said election to the said *A. B.*, then being a candidate as aforesaid thereat to be elected and returned, to the evil example, &c., and against the peace, &c.

Eighth count. And the said Attorney-General, &c., that heretofore &c., to wit, on &c., and on divers days and at divers times before and at the time the said election was so had and held as therein mentioned, to wit, at the said borough of , the said *C. D.*, with one *E. F.* and divers other persons whose names to the said Attorney-General are unknown, did unlawfully and wickedly conspire, combine, confederate and agree unlawfully and corruptly to advance and cause to be advanced, to wit, to *K. L.*, *M. N.*, *X. Y.*, and divers other persons whose

[★ 510] names to ★the said Attorney-General are unknown, certain money, to wit, the sum of £ , with the intent that such money, or some part thereof should be expended, to wit, by the persons last aforesaid in bribing 850 persons whose names are to the said Attorney-General unknown, these being persons having respectively a right to vote at the said election for the said *A. B.*, so then being a candidate to be elected and returned at the said election as in the first count of this Information is mentioned, to be thereat elected and returned, to the evil example, &c., &c.

And therefore the said Attorney-General, &c.

[Conclusion as before (*a*).]

[The above is from one of the Informations filed after the General Election of 1880.]

For other examples of Criminal Informations see the following:—

Ex-officio.—For libels on the Royal Family and Prince Regent (2 Chitt. Cr. L. 88; 3 Chitt. Cr. L. 882); for libels on foreign ambassadors (2 Chitt. Cr. L. 54; 4 Went. Prec. 10; 3 Chitt. Cr. L. 882); for riot and breaking open the house of a foreign ambassador and taking goods therefrom (2 Chitt. Cr. L. 58); for a libel on the judges (3 Chitt. Cr. L. 878); for seditious libels (2 Chitt. Cr. L. 90, 91); for seditious words (2 Chitt. Cr. L. 96, 97); for obstructing excise and custom house officers in the execution of their duties (2 Chitt. Cr. L. 126–141; 4 Went. Prec. 385–391); for attempting to bribe government officers (3 Chitt. Cr. L. 693, 695); for accepting bribes (3 Chitt. Cr. L. 689, 697); for riotous disturbance of and insults to property tax commissioners in the execution of their duties (2 Chitt. Cr. L. 490; 3 Chitt. Cr. L. 914); for violating and attempting to evade various Acts of Parliament (4 Went. Prec. 437–546).

Not ex-officio.—For libels (3 Chitt. Cr. L. 884, 898; 4 Went. Prec. 449); for sending challenges (3 Chitt. Cr. L. 848–852, 854–857, 859); for attempting to bribe the First Lord of the Treasury in order to procure the reversion to an office (3 Chitt. Cr. L. 683; for conspiracies of various kinds (2 Chitt. Cr. L. 494, 527; 3 Chitt. Cr. L 1164; 6 Went. Prec. 439); for offences by magistrates (2 Chitt. Cr. L. 236, 239, 244, 249, 253); against a gaoler [★ 511] for extortion in office and ★permitting an escape (2 Chitt. Cr. L., 297); for compounding a *qui tam* action (2 Chitt. Cr. L. 223).

(*a*) Where an indictment (since the Corrupt and Illegal Practices Prevention Act, 1883, 46 & 47 Vict. c. 51) charged only that the defendant was "guilty of corrupt practices against the form of the statutes in that case made and provided," it was held by Lord Coleridge, C.J., and Denman, Mathew and Day, JJ. (Field, J., dissenting), that the indictment was defective, and on application before verdict might have been quashed; but (by Lord Colebridge, C.J., and Field and Matthew, JJ.; *dissentientibus* Denman and Day, JJ.), that the defect was cured by the verdict of guilty.—[L. R. 17 Q. B. D., 327; 55 L. T. N. S. 122.]

CERTIFICATE OF INDICTMENT FOUND OR INFORMATION FILED IN THE QUEEN'S BENCH DIVISION.

In the High Court of Justice,
Queen's Bench Division.

(*Middlesex.*) The Queen
v.
J.J.

I hereby certify that *J.J.* stands charged by indictment found [*or* information filed] against him in this division on the day of , 1886, with [*here shortly state the offence*] and that the said *J.J.* has not appeared or pleaded to the said indictment [*or* information] nor is he under any recognizance so to do.

Dated, &c.

(Signed)
F. COCKBURN,
(Queen's Coroner and Attorney).
[*or other proper officer of the Crown Office.*]

[C. O. Forms, 41.]

NOTICE TO DEFENDANT TO APPEAR TO INFORMATION IN PURSUANCE OF UNDERTAKING IN ENLARGED ORDER.

[*Copy the enlarged Order containing the undertaking to appear, and write the following notice at the foot.*]

In the High Court of Justice,
Queen's Bench Division.

[*Somersetshire.*] The Queen
v.
B.R.

Take notice, that in pursuance of the above Order, an information has been filed in the Queen's Bench Division of Her Majesty's High Court of Justice against the above-named defendant for certain misdemeanors. And that he is hereby required to cause an appearance to be entered in the said Court thereto immediately in pursuance of his undertaking contained in the above Order. And in default thereof the said Court will be moved on the day of or so soon ★after as [★ 512] counsel can be heard, that the prosecutor be at liberty to enter an appearance thereto for the said defendant, and to sign judgment against him [*or* that an attachment may issue against him for his contempt in not performing his said undertaking.]

Dated, &c.

(Signed) *M.N.*, of *L.*, agent for *G.H.*, of *Y.*, solicitor for the prosecution.

To *B.R.*, the above-named defendant,
and to , his solicitor or agent.

If it is intended to apply for an attachment, this notice must be served personally.

[C. O. Forms, 46.]

WRIT OF SUBPŒNA, TO ANSWER ON INFORMATION.

VICTORIA, by the Grace of God, &c., to *A.B.*: We command you that, laying aside all pretences and excuses whatsoever, you be and appear in the Queen's Bench Division of Our High Court

of Justice before Us at the Royal Courts of Justice, London, on the day of , 188 , to answer to Us of and concerning such matters and things as shall then and there be objected against you on Our behalf, and, further to do and receive all and singular such matters and things as Our said Court shall then and there consider of concerning you in this behalf. And this you are not to omit under the penalty of one hundred pounds, to be levied upon your goods and chattels, lands and tenements, if you shall make default in the premises.

Witness, &c. .

Indorsement when on Criminal or Ex-officio Information.

Frederick Cockburn, Esquire, Queen's Coroner and Attorney, in the Queen's Bench Division of Her Majesty's High Court of Justice, before the Queen herself [*or, if ex-officio*, Richard Webster, Knight, Attorney-General of our Lady the Queen], for our said Lady the Queen, prosecutes this writ against the within-named *A. B.*, upon an information exhibited against him by the said Frederick Cockburn [*or* Sir Richard Webster] in the said Court for certain misdemeanors whereof he is impeached.

[C. O. Forms, 51.]

[★513] ★ AFFIDAVIT OF SERVICE OF SUBPŒNA TO ANSWER TO AN INFORMATION.

In the High Court of Justice,
Queen's Bench Division.
(*Middlesex.*)—The Queen
against
A.B.

I, *C.D.*, of, &c., make oath and say:

That I did on the day of 188 , serve *A.B.*, the above-named defendant, with the writ of subpœna to answer in this prosecution hereunto annexed, and of the indorsement thereon, by delivering a true copy of the said writ and indorsement thereon to, and leaving the same with [a servant of the said] *A. B.*, at the house or residence [*or* office] of the said *A. B.*, situate at , in the county of . And at the same time showing to the said [*servant* of the said] *A. B.*, the said original writ of subpœna; and which said writ appeared to this deponent to be duly and regularly issued out of and under the seal of this honourable Court.

Sworn, &c.

(Signed) *C.D.*

Filed on behalf of the prosecutor [*or* relator].

In cases against the Printers and Publishers of Newspapers.

Say [*as above*], by delivering a true copy of the said writ of subpœna and indorsement thereon, to, and leaving the same with, a clerk or servant of the said defendants, at the office of the said defendants, called or known as the office of the newspaper, situate at , in the county of . And at the same time, &c. [*as above*].

[C. O. Forms, 53.]

WARRANT OF ARREST.

In the High Court of Justice,
Queen's Bench Division.

England, *to wit.* Whereas it is certified to me by the proper officer in that behalf that [*as in certificate No.* 41].

These are, therefore, to command you forthwith to apprehend the said *A.B.*, and to bring him before me or some other Judge of the High Court, or before some one or more of the justices of the peace ★ in and for the said [*county*] of , to be [★ 514] dealt with according to law.

Dated, &c.

(Signed)
COLERIDGE,
(Lord Chief Justice of England.)

To Mr. [*Lewis*] tipstaff of the Queen's Bench Division of the High Court of Justice, and to all constables and other peace officers whom it may concern.

[C. O. Forms, 43.]

WARRANT TO ADMIT TO BAIL ON INFORMATION FILED IN QUEEN'S BENCH DIVISION.

In the High Court of Justice,
Queen's Bench Division.

England, *to wit.* Whereas it is certified to me by the proper officer in that behalf that [*as in certificate No.* 41].

These are, therefore, to command you forthwith to apprehend the said *A.B.*, and to bring him before me or some other Judge of the High Court of Justice in Chambers at the Royal Courts of Justice, London, or before one or more justice or justices of the peace near to the place where he shall be taken, to the end that he may find sufficient sureties for his immediate appearance in this Court, and forthwith to plead to the said indictment, "*and to try the same at the then* [*or* next] *sittings of the said Court,*" and personally to appear in the said Court on the trial of the said indictment [*or* information], and also upon the return of the postea, if he shall be convicted, and be further dealt with according to law.

Dated, &c.

(Signed)
COLERIDGE,
(Lord Chief Justice of England).

[C. O. Forms, 44.]

NOTICE OF BAIL TO AVOID ARREST.

[*Heading as in* No. 46.]

Take notice that the above-named defendant will appear before a Judge in Chambers at the Royal Courts of Justice, London [*or* before ★ a justice of the peace in and for the [★ 515] county of at ,] on the day of 188 , at the

hour of in the noon, and will then enter into his own recognizance, and put in bail to appear in this Court on the day of 188 , to the indictment found against him in this prosecution for certain misdemeanors, and to plead thereto *and try the same at the present* [*or* next] [*Trinity*] *sittings of the High Court* [*omit words in italics if indictment not found in this Court*] and personally to appear at the trial of the said indictment [*or* information], and on the return of the postea, if it be necessary, and so from day to day, and not to depart without leave of the Court. And the names and descriptions of such bail are *A.B.* of, &c. and *C.D.*, of &c.

Dated, &c.

(Signed) *M.N.*, of *T.*, agent for *X.Y.*, of *S.*, solicitor for the above-named defendant.

To *C.D.*, the prosecutor, or to
Mr. *F.*, the solicitor or agent
for the prosecutor.

[C. O. Forms, 47.]

RECOGNIZANCE TO ANSWER INFORMATION.

Be it remembered, that on the day of 188 , *A.B.*, *C.D.*, and *E.F.*, come before me, *G.H.*, Esquire, one of Her Majesty's Justices of the Peace for the county of , and acknowledge to owe our Sovereign Lady the Queen the several sums following (that is to say):—The said *A.B.* the sum of pounds, the said *C.D.* and the said *E.F.*, the sum of pounds each of lawful money of Great Britain, to be levied upon their several goods and chattels, lands and tenements, to Her Majesty's use, upon condition that if the said *A.B.* shall appear in the Queen's Bench Division of Her Majesty's High Court of Justice, at the Royal Courts of Justice, London, forthwith, and answer an indictment [*or* information] against him for certain [misdemeanors] according to the course of the said Court, *and try the same at the present* [or *next*] *sittings of the said Court* [*omit words in italics if indictment found elsewhere than in this Court*], or so soon after as the case can be heard, and shall personally appear from day to day on the trial of the said indictment, and not depart until he shall be discharged by the Court before whom such trial shall be had, and shall appear from day to day on the return of the postea in the said Court, if it be necessary, and not depart until discharged by such last-mentioned Court, then this recognizance to be void or else to remain in full force.

Taken, &c.

[C. O. Forms, 48.]

[★516] ★ NOTICE TO BE INDORSED ON COPY INFORMATION, TO BE SERVED ON A DEFENDANT IN PRISON FOR WANT OF BAIL TO ANSWER.

In the High Court of Justice,
Queen's Bench Division.
[*Devonshire.*] The Queen
against
J.J.

Take notice, that unless you shall, within the space of eight days next after the delivery hereof, cause an appearance, and also

a plea or demurrer to be entered in this Court to the within information [*or* indictment], an appearance, and a plea of Not Guilty will be entered thereto, in your name, pursuant to the rule in that case made and provided, and that the issue to be joined thereon will be tried at the next Assizes to be holden in and for the county of , [*or* at the present [*or* next] [*Hilary*] sittings of the High Court of Justice.

Dated, &c.

(Signed) *M.N.*, of *L.*, agent for *X.Y.*, of *S.*, solicitor for the prosecution.

To *J.J.*, the above-named defendant.

[C. O. Forms, 49.]

AFFIDAVIT OF SERVICE OF COPY INFORMATION, WITH NOTICE INDORSED, ON DEFENDANT IN GAOL.

[*Heading as in last.*]

I, *A.B.*, of, &c., make oath and say,—

That I did on the day of 188 , deliver to the above-named Defendant, then a prisoner in Her Majesty's prison at , in and for the county of , at the said prison, a copy of the paper writing hereunto annexed marked with the letter [*annex a copy of the information and notice indorsed*], and of the indorsement thereon.

Sworn, &c.

[C. O. Forms, 50.]

WRIT OF VENIRE FACIAS, TO ANSWER.

VICTORIA, by the Grace of God, &c., to the Sheriff of Lancashire, greeting: We command you that you cause to come before Us, in the Queen's Bench Division of Our High Court of Justice, at the Royal ★ Courts of Justice, London, on the [★ 517] day of 188 , *A.B.* to answer to Us for certain misdemeanors whereof he is indicted, and have you then there this writ.

Witness, &c.

This writ was issued by, &c.

[C. O. Forms, 52.]

WRIT OF ATTACHMENT TO ANSWER AN INFORMATION.

VICTORIA, by the Grace of God, &c., to the sheriff of , greeting: We command you that you attach *A. B.*, if he shall be found in your bailiwick, and him safely keep, so that you may have his body before Us in the Queen's Bench Division of Our High Court of Justice, at the Royal Courts of Justice, London, on the day of , to answer to Us for certain misdemeanors whereof he is impeached, and that you have then there this writ.

Witness, &c.

[C. O. Forms, 54.]

WRIT OF CAPIAS TO ANSWER INFORMATION.

VICTORIA, by the Grace of God, &c., to the sheriff of , greeting: We command you that you take *A.B.*, if he shall be found in your bailiwick, and him safely keep, so that you may have his body before Us in the Queen's Bench Division of Our High Court of Justice at the Royal Courts of Justice, London, on the day of , 188 , to answer to Us for certain misdemeanors [*or* felonies] whereof he is indicted [*or* impeached]. And have you then there this writ.

Witness, &c.

[*For writ of capias ad satisfaciendum after judgment, see No.* 144.]

[C. O. Forms, 57.]

WRIT OF CAPIAS AD SATISFACIENDUM AFTER JUDGMENT.

VICTORIA, by the Grace of God, &c., to the sheriff of , greeting: We command you that you take *A.B.*, if he shall be found in your bailiwick, and him safely keep, so that you may have his body before Us in the Queen's Bench Division of Our High Court of Justice, on the day of 188 , to satisfy Us concerning his redemption by reason of certain whereof he is indicted, and thereupon by a jury of the country [★ 518] taken between Us and the said *A.B.* [*or* by his own ★ default *or* confession] he stands convicted, as in Our said Court before Us it appears upon record. And have you then there this writ.

Witness, &c.

[C. O. Forms, 144.]

WRIT OF CAPIAS CUM PROCLAMATIONE.

VICTORIA, by the Grace of God, &c., to the sheriff of , greeting: Whereas by Our Writ of Exigent, having the same day of teste and return as this Our Writ of Proclamation, We have commanded you that you cause to be exacted [*or, of in London*, demanded] *A.B.*, from county court to county court [*or if in London*, from hustings to hustings] until he shall be outlawed, according to the law and custom of England, if he shall not appear. And if he shall appear, that then you take him, and him safely keep, so that you may have his body before Us in the Queen's Bench Division of Our High Court of Justice at the Royal Courts of Justice, London, on the day of , 188 , to answer to Us for certain whereof he is indicted [*as in the Exigent*]. We therefore command you that you cause three proclamations to be made according to the rule in that case made and provided, in the form following, that is to say, one of the same proclamations in the open county court of and in your county, and one other of the same proclamations to be made at the general quarter sessions of the peace in those parts where the said *A.B.*, at the time of the said exigent awarded, was dwelling, and one other of the same proclamations to be made one month at least before the fifth time exacted by virtue of the said Writ of Exigent, at or near to the most usual door of the church or chapel of that town or parish where the said *A.B.* was dwelling at the time of the said exigent so awarded. And if the said

A.B. was dwelling out of any parish, then in such place as aforesaid of the parish in your county next adjoining to the place of the dwelling of the said *A.B.*, and upon a Sunday immediately after divine service and sermon, if any sermon there be. And if no sermon there be, then forthwith immediately after divine service, that he, the said *A.B.*, render himself unto you before or at the time when he shall be the fifth time exacted by virtue of the said Writ of Exigent. So that you may have his body before Us in the said Queen's Bench Division, on the day of 188 , to answer to Us for the aforesaid, whereof he is indicted. And have you then there this writ.

Witness, &c.

[*To have the same teste and return as the Exigent, next succeeding form.*]

[C. O. Forms, 58.]

★ WRIT OF EXIGENT BEFORE CONVICTION. [★ 519]

VICTORIA, by the Grace of God, &c., to the sheriff of , greeting: We command you that you cause to be exacted *A.B.*, from County Court to County Court, until he shall be outlawed, according to the law and custom of England, if he shall not appear. And if he shall appear, that then you take him, and him safely keep, so that you may have his body before Us in the Queen's Bench Division of Our High Court of Justice, at the Royal Courts of Justice, London, on the day of 188 , to answer to Us for certain whereof he is indicted, and whereupon you have before returned unto Us that the said *A.B.* was not found in your bailiwick. And have you then there this writ. Witness, &c.

If in London.—Instead of "exacted," say "demanded," and instead of "from County Court to Court," say "from husting to husting."

If against a woman.—Say "waived" instead of "outlawed."

If against a man and woman.—Say "outlawed and waived."

[C. O. Forms, 59.]

WRIT OF CAPIAS CUM PROCLAMATIONE INTO A FOREIGN COUNTY.

VICTORIA, by the Grace of God, &c., to the sheriff of , greeting: We command you that you take *A.B.*, if he shall be found in your bailiwick, and him safely keep, so that you may have his body before Us in the Queen's Bench Division of Our High Court of Justice at the Royal Courts of Justice, London, on [*three or four months between the teste and return, as the case may be*], the day of next, to answer to Us for certain [misdemeanors] whereof he is indicted; and if you cannot find the said *A. B.* in your bailiwick, that then you make public proclamation in two County Courts of your county before the return of this writ, that he be before Us at the aforesaid day to answer to Us concerning the premises according to the rule in that case made and provided, and have you then there this writ. Witness, &c.

This writ was issued by, &c.

[C. O. Forms, 60.]

WRIT OF EXIGENT WITH ALLOCATUR.

VICTORIA, by the Grace of God, &c., to the sheriff of , greeting: We command you that allowing the County Courts at which was exacted and did not appear as you returned to Us on the day of last, you cause him [★520] to be further exacted at your ★ next County Court, and so from County Court to County Court, until he shall be outlawed, according to the law and custom of England if he shall not appear. And if he shall appear, that then you take him and him safely keep, so that you may have his body before Us in the Queen's Bench Division of Our High Court of Justice at the Royal Courts of Justice, London, on the day of 188 , to satisfy Us concerning his redemption by reason of certain whereof he is indicted, and thereupon by his own confession [*or* by a jury of the country], he stands convicted as in our Court before Us it appears upon record [*or* to answer to Us for certain whereof he is indicted.] And whereupon you have before returned unto Us that the said was not found in your bailiwick, and have you then there this writ. Witness, &c.

In London.—Say "hustings" instead of "County Court," and "demanded" instead of "exacted."

[*To be tested on the day of the return of the previous writ, and made returnable on the first or last day of the following sittings.*

Alias writs of Allocatur Exigent to issue if necessary, to make up the quinto exact, i. e., until the defendant has been exacted at five County Courts.

[C. O. Forms, 61.]

WRIT OF CAPIAS UTLAGATUM.

VICTORIA, by the Grace of God, &c., to the sheriff of , greeting: We command you that you take *A.B.*, if he shall be found in your bailiwick, and him safely keep, so that you may have his body before Us, in the Queen's Bench Division of Our High Court of Justice, at the Royal Courts of Justice, London, on the day of 188 , to stand right in Our Court, before Us, upon a certain outlawry against him, at Our suit, for certain whereof he is indicted, &c., and thereupon he is declared outlawed in your county, and have you then there this writ. Witness, &c.

[C. O. Forms, 62.]

WRIT OF CAPIAS ULTAGATUM, SPECIAL, CUM BREVE DE INQUIRENDO.

[*Same as the preceding.*]

[*And after the words "declared outlawed in your county, add:*

We also command you that you diligently inquire by the oath of good and lawful men of your bailiwick, what goods and chattels, lands and tenements, the said *A.B.* had on the said [★521] day of 188 , ★ [*the date of capias ultagatum*] in your said bailiwick; and those goods and chattels, lands and tenements, into whose hands soever they may have come, in your bailiwick, you cause to be taken, seized into Our hands, and ap-

praised according to the full value thereof, to Our use so that you may certify, at the aforesaid time, the true value of the same goods and chattels, lands and tenements, under their seals, or the seal of some of them, by whose oath the inquisition aforesaid shall be taken, then returning to Us this Our writ. Witness, &c.

[C. O. Forms, 63.]

WRIT OF MELIUS INQUIRENDUM.

VICTORIA, by the Grace of God, &c., to the sheriff of , greeting:

We command you that you again and more diligently inquire &c. [*continue as in preceding Form.*]

[C. O. Forms, 64.]

WRIT OF EXIGENT AFTER JUDGMENT.

[*Same as No.* 59, *ante*, *p.* 519.]

[*Except instead of to answer say:*—]

To satisfy Us concerning his redemption by reason of certain whereof he is indicted, and thereupon by a jury of the country [*or by his own confession or default*], he stands convicted. As in Our Court before Us it appears upon record. And whereupon, &c. [*as in No.*].

[C. O. Forms, 65.]

WRIT OF ERROR TO REVERSE OUTLAWRY.

VICTORIA, by the Grace of God, &c.:

To Our right trusty and well-beloved John Duke, Baron Coleridge, Our Chief Justice of England, President of the Queen's Bench Division of Our High Court of Justice and our other Justices of Our High Court attached to the said Queen's Bench Division of Our said High Court, greeting: Forasmuch as in the record and process, as also in the publication of an outlawry against *J. W.* on a certain indictment [*or* information] against the said *J. W.* for [*here shortly state nature of offence*], whereof the said *J. W.* is indicted [*or* impeached], and thereupon by a jury of the country is convicted, as it is said, manifest error hath intervened, to the great damage of the said *J. W.*, as by his complaint We are informed. We being willing that the said error (if any there ★ be) be duly amended, and full and speedy justice [★ 522] done to the said *J. W.* in this behalf, do command you, that if the said outlawry be returned before Us, as has been said: then inspecting the said record and process, you cause further to be done therein for annulling the said outlawry as of right and according to the law and custom of England shall be meet to be done. Witness Ourself at Westminster, the day of in the forty-eighth year of Our reign.

(Signed)
ESHER,
(Master of the Rolls.)

For indorsement see No.

[C. O. Forms, 66.]

ASSIGNMENT OF ERROR UPON JUDGMENT IN OUTLAWRY.

In the High Court of Justice,
Queen's Bench Division.

Middlesex.—*J. W.*, Plaintiff in error.
against
The Queen, Defendant in error.

And hereupon the said *J. W.* [*or* by *A. B.* his solicitor] comes in his proper person, and says, that in the record and process, and also in the publication of the aforesaid outlawry, there is manifest error in this that there is no sufficient information [*or* indictment] exhibited [or filed] against the said *J. W.* whereon to ground the process of the outlawry aforesaid. By reason whereof, the said outlawry is void, and of no effect or force whatever.

There is also error in this [*here set out any other errors there may be*]. Therefore in that there is manifest error.

Wherefore the said *J. W.* prays that the outlawry aforesaid for the errors aforesaid, and other errors appearing in the record and process aforesaid, may be reversed and held for nothing; and that he may be restored to the common law, and to all which he has lost by occasion of the outlawry aforesaid.

Dated, &c.

(Signed)

[C. O. Form 67.]

JOINDER IN ERROR UPON JUDGMENT IN OUTLAWRY.

[*Heading as in the last.*]

And Sir R. W. Knight, now Attorney-General of our present Sovereign Lady the Queen [*or* Frederick Cockburn, Esq., coroner [★ 523] and ★ attorney of our Lady the Queen] present here in Court in his proper person, having heard the matters aforesaid above assigned for error for our said Lady the Queen, says that neither in the record and process aforesaid, nor in the publication of the aforesaid outlawry, is there any error; and he prays that the Queen's Bench Division of Her Majesty's High Court of Justice, now here may proceed to the examination as well of the record and process aforesaid as of the matters aforesaid above assigned for error, and that the outlawry aforesaid may in all things be affirmed.

[C. O. Forms, 68.]

BAIL.

WRIT OF HABEAS CORPUS TO BRING UP PRISONER TO BE BAILED.

VICTORIA, by the Grace of God, &c., to , greeting:

We command you that you have in the Queen's Bench Division of our High Court of Justice [*or* before a Judge in Chambers], at the Royal Courts of Justice, London, immediately after the receipt of this Our writ, the body of *A. B.* being taken and detained under your custody as is said, together with the day and cause of his being taken and detained, by whatsoever name he may be called, to undergo and receive all and singular such

matters and things as Our said Court [*or* Judge] shall then and there consider of concerning him in this behalf; and have you there then this Our writ.

Witness, &c.

To be indorsed.

By order of Court [*or* of Mr. Justice].
This writ was issued by, &c.

[C. O. Forms, 69.]

SUMMONS TO ADMIT TO BAIL ON A CRIMINAL CHARGE.

In the High Court of Justice,
Queen's Bench Division.

The Honourable Mr. Justice in Chambers.

[*If indictment or information found in this Court insert title.*]

Upon reading the affidavit of , &c., filed the day of 188 , and upon hearing counsel [*or* the solicitor] for *A. B.* It is ordered that all parties concerned attend the Judge in Chambers on the day of 188 , at the hour of in the noon, ★ on the hearing of an application [★ 524] on behalf of the said *A.B.* to be admitted to bail.

Dated, &c.

Notice.—To be served upon the committing magistrates or coroner and prosecutor, or in case of murder or manslaughter on the widow or next of kin of the deceased, or as the Judge may direct.

[C. O. Forms, 70.]

ORDER TO ADMIT PRISONER TO BAIL.

In the High Court of Justice,
Queen's Bench Division.

The Honourable Mr. Justice in Chambers.

[*If indictment or information in this Court insert title.*]

Upon reading the affidavit of filed the day of 188 , and upon hearing counsel [*or* the solicitor] for . It is ordered that upon *A.B.* giving security by his own recognizance in the sum of with [*two*] sufficient sureties in the sum of each before one of Her Majesty's Justices of the Peace in and for the county of [*or* before a Judge in Chambers] for the personal appearance of the said *A.B.* at the next assizes and general session of oyer and terminer [*and general gaol delivery*] [*or* the next general quarter sessions of the peace] to be holden in and for the said county of then and there to answer to all such matters and things as, on Her Majesty's behalf, shall be objected against him, he the said *A.B.* be discharged out of the custody of the Governor of Her Majesty's prison at in the said county as to his commitment for [*here shortly state the offence as in commitment.*]

Dated, &c.

(*Twenty-four hours' notice of the names and descriptions of the proposed sureties must be given to the prosecutor unless the Judge order otherwise.*

[C. O. Forms, 71.]

AFFIDAVIT OF SERVICE OF SUMMONS, TO ADMIT TO BAIL, ON THE COMMITTING MAGISTRATES, AND NEXT OF KIN OF DECEASED, OR THE PROSECUTOR.

In the High Court of Justice,
Queen's Bench Division.

[*If indictment or information in this Court, insert name of cause, not otherwise.*]

I, *A.B.*, of, &c., clerk to *C.D.* of , solicitor for [*insert name of prisoner*], make oath and say—

[★525] ★1. That I did on the day of 188 , serve *I.J.*, Esquire, one of the committing justices mentioned in the summons hereunto annexed with the said summons, by delivering a true copy of the said summons to a servant of the said *I.J.*, at the house of the said *I.J.*, situate at in the said county.

2. That I did on the day of also serve *K.L.*, Esquire, the other committing justice also mentioned in the said summons, by delivering a true copy of the said summons to a servant of the said *K.L.* at the house of the said *K.L.*, situate at in the said county of .

3. That I did on the day of 188 , also serve *E.F.*, gentleman, one of the coroners of and for the county of , also named in the said summons, by delivering a true copy of the said summons to a clerk [*or* servant] of the said *E.F.*, at the office [*or* house] of the said *E.F.*, situate at in the said county.

4. That I did on the day of 188 , also serve *G.H.* [*the widow or the next of kin of deceased, or the prosecutor*] mentioned in the said summons with the said summons by delivering a true copy of the said summons to the said [*the widow or next of kin or prosecutor*] at in the county of .

Sworn, &c.

[C. O. Forms, 72.]

NOTICE OF BAIL, UPON ORDER OF JUDGE, WITHOUT HABEAS CORPUS.

Whereas the Honourable Mr. Justice has made an order bearing date the day of 188 , that [*recite the order: See No.* 71].

Now take notice that in pursuance of the said order the said and [*four*] sufficient sureties will enter into such recognizance as aforesaid before [*as in the order*] at on the day of at the hour of in the noon. And that the dates and descriptions of such sureties are

Dated, &c.

(Signed)
M.N. of *L.* agent for *G.H.* of *Y.*,
solicitor for the said .

To the prosecutor [*or* widow *or* next of kin] and to the committing magistrates [*or* coroner.]

[C. O. Forms, 73.]

★ NOTICE OF BAIL UPON HABEAS CORPUS. [★ 526]

Whereas the Honourable Mr. Justice has granted a writ of *habeas corpus*, directed to the gaoler of her Majesty's prison at of and for the , commanding him to have the body before the Queen's Bench Division of Her Majesty's High Court of Justice [*or* before a judge at Chambers] immediately to undergo, &c. [*as in Form* 69].

Now take notice, that by virtue of the said writ, the said will be brought before Her Majesty's said Court [*or* before a judge at Chambers at the hour in the noon] on the day of 188 , in order that he, the said , may be admitted to bail personally to appear at the next sessson of oyer and terminer and gaol delivery to be holden in and for the county of [*or otherwise as the case may be*], then and there to answer to all such matters and things as on Her Majesty's behalf shall be then and there objected against him, and so from day to day, and not depart that Court without leave. And, further, take notice that the names and descriptions of the several persons who will offer themselves as bail or sureties for the said are *A.B.*, of , *C.D.*, of , *E.F.*, of , and *G.H.* of .

Dated, &c.

[C. O. Forms, 74.]

RECOGNIZANCE TO APPEAR AT ASSIZES, OR SESSIONS OF THE PEACE.

Be it remembered, that on the day of 188 , [*insert the names and descriptions of defendant and bail*], come before me, , one of her Majesty's Justices of the Peace in and for the county of , and acknowledge to owe our Sovereign Lady the Queen the several sums following (that is to say):—The said the sum of pounds, and the said and the sum of pounds each of lawful money of Great Britain, to be levied upon their several goods and chattels, lands and tenements, to Her Majesty's use upon condition that if the said shall personally appear at the next assizes and session of oyer and terminer and general gaol delivery [*or* at the next general quarter sessions of the peace], to be holden in and for the county of , and then and there answer to all such matters and things as on Her Majesty's behalf shall then and there be objected against him, and so from day to day, and not depart that Court without leave, then this recognizance to be void, or else to remain in full force.

Taken, &c.

[C. O. Forms, 75.]

★ ENTRY OF PLEA OF NOT GUILTY OR GUILTY TO INFORMATION. [★ 527]

In the High Court of Justice,
Queen's Bench Division.

[*Middlesex.*]—The Queen
against
A. B.

Enter plea of Not Guilty [*or* Guilty] for the above-named de-

fendant *A.B.* to the indictment [information *or* inquisition] in this prosecution by *C.D.*, his solicitor [*or* in person.]

Dated, &c.

(Signed) *C.D.*, of *L.*, Agent for *G.H.*, of *Y.*, solicitor for the said *A.B.*

[C. O. Forms, 78.]

DEMURRER TO INFORMATION.

[*Heading as in last preceding.*]

And now, that is to say, on the day of , 188 , before our said Lady the Queen, in the Queen's Bench Division of Her Majesty's High Court of Justice at the Royal Courts of Justice, London, comes the said *A.B.* by , his solicitor [*or* in his own proper person], and having heard the said indictment [*or* information] read, says that our said Lady the Queen ought not further to prosecute him, the said *A.B.*, by reason of the premises in the said indictment [*or* information] mentioned, because he says that the said indictment [*or* information], and the matters therein contained, are not sufficient in law to compel him, the said *A.B.*, to answer thereto; and this he is ready to verify. Wherefore he, the said *A.B.*, prays judgment, and that by the Court here he may be dismissed and discharged from the said premises in the same indictment [*or* information] specified.

(Signed)

[C. O. Forms, 80.]

PLEA OF NOT GUILTY AND JUSTIFICATION PURSUANT TO 6 & 7 VICT. C. 96, S. 6.

[*Same heading.*]

And now, that is to say, on the day of , 188 , before our said Lady the Queen, in the Queen's Bench Division of [★ 528] Her Majesty's ★ High Court of Justice at the Royal Courts of Justice, London, comes the said *A.B.* by , his solicitor [*or* in his own proper person], and having heard the said indictment read, he says that he is not guilty thereof, and hereupon he puts himself upon the country. And Frederick Cockburn, Esquire, coroner and attorney of our said Lady the Queen, before the Queen herself, who for our said Lady the Queen in this behalf prosecutes, does the like.

And for a further plea the said *A.B.*, pursuant to the statute in that behalf, says that our said Lady the Queen ought not further to prosecute the said indictment [*or* information] against him, because he say s that it is true that [*here allege the truth of every libellous part of the publication set out in the indictment*].

And the said *A.B.* further says, that before and at the time of the publication in the said ind ictment [*or* information] mentioned [*here state facts which rendered the publication of benefit to the public*]; by reason whereof it was for the public benefit that the said matters so charged in the said indictment [*or* information] should be published, and this he, the said *A.B.*, is ready to verify. Wherefore he prays judgment, and that by the Court here he may be dismissed and discharged from the said premises in the said indictment [*or* information] above specified.

(Signed)

[C. O. Forms, 81.]

REPLICATION TO PLEA OF JUSTIFICATION PURSUANT TO 6 & 7 VICT. C. 96, S. 6.

[*Same heading.*]

And as to the plea of the said *A.B.* by him secondly above pleaded, Frederick Cockburn, Esquire, coroner and attorney of our said Lady the Queen, before the Queen herself, who for our said Lady the Queen in this behalf prosecutes, says that by reason of anything in the said second plea alleged, our said Lady the Queen ought not to be precluded from further prosecuting the said indictment against the said *A.B.*, because he says that he denies the said several matters in the said second plea alleged, and says that the same are not, nor are, nor is any or either of them, true, and this he, the said Frederick Cockburn, prays may be inquired of by the country, and the said *A.B.* does the like.

Therefore let a jury come.

[C. O. Forms, 83.]

★ DEMURRER BY PROSECUTOR TO DEFENDANT'S PLEA. [★ 529]

[*Same heading.*]

And Frederick Cockburn, Esquire, coroner and attorney of our said Lady the Queen, who, for our said Lady the Queen, in this behalf prosecutes, having heard the said plea, of the said *A.B.*, by him, in manner and form above pleaded in bar, for our said Lady the Queen says, that the said plea, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law, and that he, the said coroner and attorney for our said Lady the Queen, is not bound by the law of the land to answer the same, and this he, the said coroner and attorney, is ready to verify. Wherefore, for want of a sufficient plea in this behalf, the said coroner and attorney for our said Lady the Queen prays judgment, and that the said *A.B.* may be convicted of the premise above charged upon him.

(Signed)

[C. O. Forms, 84.]

JOINDER IN DEMURRER BY PROSECUTOR.

[*Same heading.*]

And Frederick Cockburn, Esquire, coroner and attorney of our said Lady the Queen, before the Queen herself, who for our said Lady the Queen in this behalf prosecutes, says that our said Lady the Queen ought not to be barred from prosecuting the said indictment [*or* from having her aforesaid information], against the said *A.B.*, because he says, that the said indictment [*or* information] and the matters therein contained are good and sufficient in law to compel him, the said *A.B.*, to answer thereto. Therefore he, the said coroner and attorney for our said Lady the Queen prays judgment, and that the said *A.B.* may be convicted of the premises charged upon him in and by the said indictment [*or* information].

[C. O. Forms, 85.]

JOINER IN DEMURRER BY DEFENDANT.

[*Same heading.*]

And the said *A.B.* by says that the said plea and the matters therein contained, in manner and form as the same are above pleaded and set forth, are sufficient in law to bar or preclude our said Lady the Queen from having her aforesaid infor- [★ 530] mation against him, the ★ said *A.B.*, and that he is ready to verify and prove the same, as the Court shall award. Wherefore, inasmuch as the said coroner and attorney has not answered or denied the said plea, nor in any manner replied to the same, he the said *A.B.* prays judgment, and that he may be discharged by the Court here, of and from the premises by the said information above charged upon him.

[C. O. Forms, 86.]

ENTRY OF PLEA OF GUILTY OR CONFESSION.

[*Instead of "says he is not guilty"*] says he cannot deny but that he is guilty of the premises in the indictment within specified and charged upon him, and confesses and acknowledges the premises aforesaid, in manner and form as in and by the said indictment is within alleged against him; and hereupon he puts himself upon the mercy of our said Lady the Queen.

[C. O. Forms, 113.]

ENTRY OF RETRAXIT OF PLEA, AND JUDGMENT THEREON.

And on the day of before our said Lady the Queen in the Queen's Bench Division of Her Majesty's High Court of Justice at the Royal Courts of Justice, London, comes the said Frederick Cockburn, who for our said Lady the Queen in this behalf prosecutes as the said *A.B.*, by *C.D.*, his solicitor [*or* in his own proper person], and the said *A.B.* having withdrawn his plea by him above pleaded, in manner and form aforesaid, our said Lady the Queen remains against him the said *A.B.* without defence in this behalf. Whereupon all and singular the premises being seen and fully understood by the said Queen's Bench Division now here, it is considered and adjudged by the said Court here that he, the said *A. B.*, be convicted of the trespass and offence aforesaid, and that he be taken, and so forth.

[C. O. Forms, 114.]

ORDER TO EXTEND TIME FOR PLEADING.

In the High Court of Justice,
Queen's Bench Division.

The Honourable Mr. Justice , Judge in Chambers.

[*Middlesex*]—The Queen
against
A.B.

Upon reading the affidavit of filed the day of 188 , and upon hearing :

★ It is ordered that the defendant [*or* prosecutor] shall [★ 531] have days further to plead to the [*indictment*] in this prosecution [upon the following terms, viz. :—]

Dated, &c.

[C. O. Forms, 87.]

NOTICE OF TRIAL IN MIDDLESEX OR LONDON.

In the High Court of Justice,
Queen's Bench Division.
Middlesex [or *London*]—The Queen
against
C.D.

Take notice of trial of the issue joined in this prosecution in Middlesex [*or* London], for the day of next, at the Royal Courts of Justice, London.

Dated, &c.

[C. O. Forms, 89.]

NOTICE OF TRIAL FOR THE ASSIZES.

In the High Court of Justice,
Queen's Bench Division.
[*Surrey.*]—The Queen
against
A.B.

Take notice of trial of the issue joined in this prosecution for the next assizes to be holden at in and for the county of on the day of 188 .

Dated, &c.

[C. O. Forms, 90.]

RECORD OF INFORMATION (CRIMINAL) FOR TRIAL.

Pleas before our Lady the Queen, in the Queen's Bench Division of Her Majesty's High Court of Justice, at the Royal Courts of Justice, London, in the year of our Lord one thousand eight hundred and eighty-

Amongst the Pleas of the Queen Roll.

Amongst the Informations of 188 , No. { [*Middlesex*]—Be it remembered that Frederick Cockburn, Esquire, coroner and attorney of our said Lady the Queen, in

the Queen's ★ Bench Division of Her Majesty's High [★ 532] Court of Justice, before the Queen herself, who for our said Lady the Queen in this behalf prosecutes in his proper person, came here into the Queen's Bench Division of Her Majesty's High Court of Justice, before the Queen herself, at the Royal Courts of Justice, London, on the day of one thousand eight hundred, &c. And for our said Lady the Queen, brought into the said Court, before the Queen herself, a certain information, against *C.D.*, which said information follows in these words, that is to say [*here set out the information verbatim*].

* [Wherefore the sheriff of the county of was commanded that he should cause him, the said *A.B.*, to come to an- *These words may

be omitted if process not actually issued.

swer to our said Lady the Queen touching and concerning the premises aforesaid.] And now, that is to say, on the day of in the year of our Lord one thousand eight hundred and eighty-five, before our said Lady the Queen, at the Royal Courts of Justice, London, comes the said *A.B.*, by his solicitor, and having heard the said information read, says, that he is not guilty thereof, and hereupon he puts himself upon the country, and Frederick Cockburn Esquire, coroner and attorney of our said Lady the Queen, in the Queen's Bench Division of Her Majesty's High Court of Justice, before the Queen herself, who for our said Lady the Queen in this behalf prosecutes, does the like.† Therefore let a jury thereupon come.

†Should plea of justification under statute be entered it must be added here.

[C. O. Forms, 92.]

RECORD OF INFORMATION (EX-OFFICIO) FOR TRIAL.

[*Same as last.*]

[*Using the name of the Attorney or Solicitor General, instead of that of the Queen's coroner and attorney.* Thus:] Sir Richard Webster, Knight, Attorney General of our present Sovereign Lady the Queen, who for our said Lady the Queen in this behalf prosecutes, came here into the Queen's Bench Division, &c.

[C. O. Forms, 93.]

SUGGESTION THAT A FAIR AND IMPARTIAL TRIAL CANNOT BE HAD.

And hereupon the said says that a fair and impartial trial of the issue joined in this prosecution cannot be had by a jury of the county of , and that it is convenient that the said issue be tried by a jury of the county of , which is a county next adjoining to the said county of , and for [★ 533] that reason he the said prays ★ that a jury may come before our said Lady the Queen, out of the body of the said county of , to try the issue aforesaid. And because the said does not deny the said allegation, nor say anything against the same, and because it appears to the said Court, before the Queen herself, that the said allegation is true, therefore let a jury of the said county of thereupon come.

[C. O. Forms, 94.]

SUGGESTION UNDER 38 GEO. 3, C. 52, TO TRY IN AN ADJOINING COUNTY TO A TOWN AND COUNTY OF THE TOWN.

And hereupon the said , coroner and attorney of our said Lady the Queen, who prosecutes as aforesaid, by virtue of the statute in such case made and provided, prays the said Court now here to direct that the said issue so joined upon the said indictment may be tried by a jury of the county of [*York*], being the county next adjoining to the town and county of the town of [*Kingston-upon-Hull*]. And the said Court thinking it fit and proper so to do, therefore let a jury of the said county of [*York*] thereupon come.

[*When on behalf of the defendant insert the defendant's name in the place of the Queen's coroner and attorney.*

[C. O. Forms, 96.]

SUGGESTION IN BERWICK-UPON-TWEED.

And because the borough of Berwick-upon-Tweed is a place where the burgesses of the said borough, by reason of their privilege, ought not to be put upon a jury to try the said issue out of the said borough, but the said issue ought to be tried by a jury of the county of Northumberland, which is the next adjacent county to the said borough of Berwick-upon-Tweed. Which allegations of the said *A. B.* are not denied by the said *F. C.*, Esquire, therefore let a jury of the said county of Northumberland thereupon come.

[C. O. Forms, 97.]

SUGGESTION IN ONE OF THE CINQUE PORTS.

And hereupon the said *F. C.*, Esquire, who prosecutes as aforesaid, says, that the said town of Deal is one of the ancient towns of the Cinque Ports; and that the inhabitants within the same town, and also the inhabitants within the liberty of the Cinque Ports, have such ★franchises, that no justice, or any [★ 534] other minister of our said Lady the Queen can or ought to enter the town to execute any office there, nor ought the freeholders or residents within the liberties of the said Cinque Ports to go out of the same, to make or constitute any jury without the said liberties. And therefore he prays that a jury may come before our said Lady the Queen, out of the body of the county of Kent, in order to try the issue aforesaid. And because the said [*defendant*] does not deny the said allegation; and because it appears to the said Court that it is fit and proper so to do, the same is granted to him. Therefore let a jury thereupon come out of the body of the said county of Kent.

[C. O. Forms, 98.]

SUGGESTION WHERE THE SHERIFF IS DEFENDANT.

And because the aforesaid *A. B.*, the defendant above-mentioned, now is one of the sheriffs of the said where the supposed offence in the said information [*or* indictment] is mentioned to be committed, and therefore is concerned in interest in the event of the trial of the issue; therefore the coroners of the said county are commanded that they cause to come.

[C. O. Forms, 99.]

JUDGE'S ORDER TO STRIKE SPECIAL JURY AS PROVIDED BY "THE JURIES ACT, 1870."

In the High Court of Justice,
Queen's Bench Division.

The Honourable Mr. Justice in Chambers.

[*Middlesex.*]—The Queen
against
A. B.

Upon reading
and upon hearing counsel on both sides [*or as the case may be*]—
It is ordered at the prayer and instance of the [*prosecutor*], that the issue joined in this prosecution be tried by a special jury

of the county of , and that the sheriff of the said county or his under sheriff do attend at the Crown Office with the juror's book and the special jurors' list of the said county, and the numbers referring to the names in such list, written upon distinct pieces of parchment or card. And that the proper officer at the Crown Office shall nominate forty-eight men qualified to serve on special juries within the said county, and the solicitor or agent [★ 535] for the said prosecutor shall strike ★ out twelve, and the solicitor or agent for the defendant shall in like manner strike out twelve of the said forty-eight, and that twenty-four, the remainder of the said forty-eight, shall be returned for the trial of the issue joined in this prosecution.

Dated, &c.

[C. O. Forms, 100.]

WARRANT OF TALES.

Middlesex. Sir Richard Webster, Knight, Attorney-General of our present Sovereign Lady the Queen [for our said Lady the Queen [*omit these words if the tales is prayed for the defendant*] prays a Tales de Circumstantibus to be granted by the Court here according to the form of the Statute in such cases made and provided for the trial of the issue joined between our said Lady the Queen and *A. B.* upon an indictment [*or* information] for certain [misdemeanors] lest the jury to be taken in this behalf do remain untaken for default of jurors.

Dated, &c.

(Signed)
R. WEBSTER,
Attorney-General.

[C. O. Forms, 102.]

ASSOCIATE CERTIFICATE AFTER TRIAL.

In the High Court of Justice,
Queen Bench Division.
Middlesex.—The Queen
against
A. B.

I certify that this [*indictment*] was tried before the Honourable Mr. Justice at and a [*special*] jury of the county of on the day of 1886.

The jury found the defendant guilty [*or* not guilty, *or* guilty on *such and such* counts, and not guilty *on such and such* counts, *enumerating them*].

That the Judge sentenced the defendant to pay a fine of, &c.

That the Judge certified [*that the case was proper to be tried by a special jury or other certificate, as the case may be*].

Dated, &c.

(Signed)
X. Y.
[*Title of officer.*]

[C. O. Forms, 103.]

★ POSTEA ON TRIAL IN MIDDLESEX OR LONDON. [★536]

Afterwards on the day of 188 , before the Right Honourable John Duke, Baron Coleridge, Lord Chief Justice of England (*or* the Honourable Mr Justice) come as well the within-named *F.C.*, Esquire, who for our said Lady the Queen in this behalf prosecutes as the within-named *A.B.*, by his solicitor within mentioned, (*A*) and a [*special*] jury of the within county, to wit [*here insert the names and descriptions of the jurors who attended*], being summoned and called come and are sworn upon the said jury. Whereupon public proclamation is made here in Court for our said Lady the Queen, as the custom is, that if there be any one who will inform the aforesaid Chief Justice [*or* Judge] the Queen's Attorney-General or jurors of the jury aforesaid, concerning the matters within contained, he should come forth and should be heard, and hereupon, *J.P.*, Esquire, one of the counsel of our said Lady the Queen [*or* of counsel learned in the law] offers himself on behalf of our said Lady the Queen to do this. Whereupon the Court here proceeds to the taking of the inquest aforesaid (B) by the jurors aforesaid, now before appearing for the purpose aforesaid, who being chosen, tried, and sworn to speak the truth touching and concerning the matters within contained [*when convicted*] say upon their oath, that the said *A.B.* is guilty of the premises in the [*if in some counts only, say:* second and third counts of the] indictment [*or* information] within specified and charged upon him in manner and form, as in and by the said indictment [*or* information] is within alleged against him.

[*When acquitted*] say upon their oath the said *A.B.* is not guilty of the premises in the indictment within specified and charged upon him, in manner and form as the said *A.B.* has, by pleading for himself, alleged.

If a tales has been prayed—

A. And a [*special*] jury of the within county being summoned and called, some of them, that is to say [*name such of the jurors as appeared at the trial*] come and are sworn upon the said jury; and because the rest of the jurors of the said jury do not appear, therefore others of the bystanders being chosen by the sheriff of the within county, at the request of the said *A.B.*, [*or* of the said Frederick Cockburn] and by command of the said Chief Justice [*or* Judge] are newly appointed, whose names are added to the panel according the form of the statute in such case made and provided, which said jurors so newly appointed to wit, [*insert the names and descriptions of the talesmen*] being called likewise come, and are sworn upon the said jury.

B. As well by the jurors aforesaid first impanelled and sworn, as ★ by the other jurors now here appearing, who, to- [★537] gether with the jurors aforesaid first impanelled and sworn, being chosen, tried, and sworn to speak the truth, &c.

[C. O. Forms, 104.]

POSTEA AT THE ASSIZES.

Afterwards on the day of 188 , [*the commission day*] at in the county of before the Honourable Mr. Justice and the Honourable Mr. Justice , justices of our said Lady the Queen assigned to hold the

assizes in and for the county of within-mentioned, according to the form of the statute in such case made and provided, come [*&c. as in No.* 104].

[C. O. Forms, 105.]

WARRANT TO APPREHEND DEFENDANT SENTENCED AT TRIAL WHEN NOT PRESENT AT THE TRIAL.

Whereas the above-named defendant *A.B.* was on the day of , 188 , at the sittings of the High Court of Justice, in the county of [*Middlesex*] before me the Honourable Mr. Justice tried, and by a jury of the country convicted of certain misdemeanors [*or* felonies], whereof he is indicted, and it was thereupon considered and adjudged and ordered by me that for the offences whereof he was so convicted as aforesaid he the said *A.B.* should be imprisoned in Her Majesty's prison at in and for the county of for the space of [*three calendar months*].

These are therefore to command you to apprehend and take the said *A.B.* and lodge him at the said prison at aforesaid, there to be imprisoned and kept in safe custody by the gaoler of the said prison in execution of the said judgment.

Dated, &c.

[C. O. Forms, 106.]

WARRANT AFTER CONVICTION TO HOLD DEFENDANT TO BAIL TO APPEAR FOR SENTENCE.

In the High Court of Justice,
Queen's Bench Division.

England, to wit. Whereas it is certified to me by [*one of the clerks in the Crown Office*], that, [*as in certificate*].

These are therefore to command you in Her Majesty's name to [★ 538] ★ apprehend and take the said *A.B.* before one of the Judges of the High Court of Justice, if taken in or near the cities of London or Westminster, if elsewhere before some justice of the peace near to the place where he shall be taken, to the end that he may become bound by his own recognizance in the sum of pounds, with two sureties in the sum of pounds each [*or say*, with sufficient sureties], for his personal appearance in the Queen's Bench Division of Her Majesty's High Court of Justice on the day of 188 , in order to receive the judgment of the said Court for his said offence, and to be further dealt with according to law.

Dated, &c.

(Signed)
COLERIDGE,
(Lord Chief Justice of England).

To Mr. *L.*, tipstaff of the Queen's Bench Division.
To all constables and all other peace officers whom it may concern.

[C. O. Forms, 107.]

ORDER TO COMMIT WHEN DEFENDANT SENTENCED AT TRIAL.

In the High Court of Justice,
Queen's Bench Division.
[*Cheshire.*]—The Queen
against
A B.

The defendant *A.B.* being present here in Court, and being by a jury of the country convicted of certain misdemeanors [*or* felonies], whereof he is indicted in this prosecution, it is ordered that he, the said defendant, [*do pay a fine to our Sovereign Lady the Queen of pounds of lawful money of Great Britain, and further that he be imprisoned until the said fine be paid; and the said defendant is now here in Court committed to the custody of the gaoler of Her Majesty's prison at until the said fine be paid, or as the case may be*].

Dated, &c.

By the Court.

[C. O. Forms, 108.]

★ CERTIFICATE OF CONVICTION FROM CLERK [★ 539] OF ASSIZE OR ASSOCIATE FOR APPLICATION FOR WARRANT.

[*Heading as in No.* 103.]

I hereby certify that the above-named defendant *A.B.* was, on the day of, at , tried before the Honourable Mr. Justice and a [special jury], upon an indictment against him for [*here state offence*], that the jury found the said defendant guilty, and that the Judge sentenced the said defendant to [*here insert sentence*].

Dated, &c.

(Signed)
X. Y.
[*Title of officer.*]

[C. O. Forms, 109.]

WARRANT OF ARREST AFTER CONVICTION AND RECOGNIZANCES ESTREATED.

England, to wit. Whereas it is certified to me by one of the Masters of the Crown Office that at the assizes [*or as the case may be*] holden in and for the county of , on the day of , an indictment for certain [misdemeanors] was found by the grand jury of the said county against *A.B.*, which said indictment was afterwards by writ of certiorari issuing out of the Queen's Bench Division of Her Majesty's High Court of Justice, removed into the said Court, and thereupon the said *A.B.* gave a recognizance to answer the said indictment, and not depart the said Court without leave, and that the said *A.B.* having appeared and pleaded not guilty to the said indictment, was at , on the day of last, in and for the county of Middlesex, before the [*naming the Judge*] and by a jury of the country convicted of the said offence charged upon him in and by the

said indictment; and it is further certified that on the day of last the said *A.B.*, having been three times publicly called in the said Court upon his said recognizance and not appearing, it was ordered by the said last-mentioned Court that his default should be recorded and the said recognizance estreated into the Exchequer; and it is further certified that the said *A.B.* hath not appeared in the said Queen's Bench Division of Her Majesty's High Court of Justice, in order to receive the judgment of the said Court for the said offence, nor is he now under any recognizance so to do. This is therefore to command you, in her Majesty's name, to apprehend and take the said *A.B.*, and if he [★ 540] shall be apprehended during ★ the sittings of the said last-mentioned Court, to bring him into the Queen's Bench Division of Her Majesty's High Court of Justice, at the Royal Courts of Justice, London, to receive the judgment of the said Court for his said offence; or if he shall be apprehended in vacation, forthwith to convey him to the common prison of the county, city, or place where he shall be apprehended, there to remain without bail or mainprise until he shall be discharged by due course of law.

Dated, &c.

[C. O. Forms, 110.]

WARRANT OF ARREST ON CONVICTION BY DEFAULT TO HOLD DEFENDANT TO BAIL.

England, to wit. Whereas, &c. (*as in No.* 110).

And it is further certified that the said defendant having suffered judgment to pass against him by default upon the said information [*or* indictment], judgment has been thereupon signed against him, and it is further certified that the said defendant has not as yet received the sentence of the said Court for the said offence, nor is he under any recognizance in the said Court so to do.

These are, therefore, to command you and every of you on sight hereof to apprehend and take the said *A.B.* and bring him before me or one other of the Judges of the Queen's Bench Division of the High Court of Justice if taken in or near the cities of London and Westminster, if elsewhere before some justice of the peace near to the place where he shall be herewith taken, to the end that he may become bound with sufficient sureties for his personal appearance in the Queen's Bench Division of Her Majesty's High Court of Justice on the day of in order to receive the sentence of the said Court for the said offence and be further dealt with according to law.

Dated, &c.

[C. O. Forms, 111.]

ENTRY OR JUDGMENT ROLL ON INDICTMENT.

A.B. [*the defendant's name.*]

As yet of 188 . The Queen.

Amongst the Indictments of 188 , No. } *Middlesex.*—Some time ago, that is to say [*here copy the caption of the indictment, and the indictment verbatim, according to the office copy,*

Award of certiorari. [★ 541] *omitting the witnesses'* ★ *names*], which said indictment our said Lady the Queen afterwards for certain reasons caused to

be brought before her, to be determined according to the law and custom of England.]

This must be omitted when the indictment is found in this Court.

Wherefore the sheriff of the said county of was commanded that he should cause him the said *A.B.* [*the defendant*] to come to answer to our said Lady the Queen, touching and concerning the premises aforesaid. [*If a capias has been issued say instead of* "cause him the said *A.B.* to come," "take him."]

Award of venire or capias to answer.

And now, that is to say, on the day of in the year of our Lord one thousand eight hundred and eighty-six before our said Lady the Queen in the Queen's Bench Division of Her Majesty's High Court of Justice at the Royal Courts of Justice, London, comes the said *A.B.* by *C.D.*, his solicitor, and having heard the said indictment read, he says that he is not guilty thereof, and hereupon he puts himself upon the country. And Frederick Cockburn, Esquire, coroner and attorney of our said Lady the Queen, in the said Queen's Bench Division of Her Majesty's High Court of Justice, before the Queen herself, who for our said Lady the Queen in this behalf prosecutes, does the like. Therefore let a jury thereupon come.

Issue.

For other suggestions for change of venue, Nos. 94 to 99.

please *see* Nos. 79 to 86 and 113, and

Postea.

And afterwards, that is to say, on the day of in the year of our Lord one thousand eight hundred and eighty-six at the Royal Courts of Justice, London, before the Right Honourable John Duke, Baron Coleridge, Lord Chief Justice of England, come as well the aforesaid Frederick Cockburn, Esquire, who for our said Lady the Queen in this behalf prosecutes as the said *A.B.* by *C.D.*, his solicitor above-mentioned, and the jurors of the jury being summoned and called, to wit [*here insert the names and descriptions of the jurors, and if a tales, add the necessary words from No.* 104], come and are sworn upon the said jury. Whereupon public proclamation is made here in Court for our said Lady the Queen, as the custom is, that if there be any one who will inform the aforesaid Chief Justice, the Queen's Attorney General, or the jurors aforesaid, concerning the matters within contained, he should come forth and should be heard; and hereupon *F.T.*, Esquire, one of the counsel of our said Lady the Queen, offers himself on behalf of our said Lady the Queen to do this. Whereupon the Court here proceeds to the taking of the inquest aforesaid, by the jurors aforesaid, now here appearing for the purpose aforesaid, who being chosen, tried, and sworn, to speak the truth touching and concerning the matters aforesaid, say upon their oath that the said *A.B.* is guilty of the premises in the second and third counts of the indictment within specified and charged upon him in manner and form as in the said indictment is alleged against him, and that he the said *A.B.* is not guilty of the premises in the first and fourth counts of the said indictment specified and charged upon ★ him in man- [★ 542] ner and form as the said *A.B.* has by pleading for himself alleged.

For other forms *see* Nos. 104 and 105.

Entry of judgment upon verdict after conviction.

Whereupon all and singular the premises being seen and fully understood by the Queen's Bench Division of Her Majesty's High Court of Justice now here, it is considered and adjudged by the said Court here that he the said *A.B.*, for his offences aforesaid be taken, and so forth.

Final judgment.

And afterwards, that is to say, on the day of in the year last aforesaid, before our Lady the Queen in the Queen's Bench Division of Her Majesty's High Court of Justice at the Royal Courts of Justice, London, come the said *F.C.*, who for our said Lady the Queen in this behalf prosecutes. And the said *A.B.*, being present here in Court, it is considered and ad-

judged and ordered by the said Court here, that he the said *A.B.*, for his offences aforesaid, &c. [*Copy the sentence from the Order of Court.*]

[C. O. Forms, 112.]

ROLL FOR TRIAL AT BAR.

[*Same as last.*]

ENTRY OF JUDGMENT UPON VERDICT AFTER ACQUITTAL.

[*After the Postea.*]—Whereupon all and singular the premises being seen and fully understood by the Queen's Bench Division of Her Majesty's High Court of Justice now here, it is considered and adjudged by the said Court here, that he, the said *A.B.*, do depart hence without day in this behalf.

[C. O. Forms, 115.]

ENTRY OF JUDGMENT BY DEFAULT.

And now, that is to say, on the day of in the year of our Lord one thousand eight hundred and eighty-five, before our said Lady the Queen in the Queen's Bench Division of Her Majesty's High Court of Justice at the Royal Courts of Justice, London, comes the said *A.B.* [*by C.D., his solicitor*], and having heard the said indictment read, he prays a day to answer thereto, until on the day of . And it is granted to him. The same day is given as well to *F.C.*, Esq., coroner and attorney of our said Lady the Queen, who for our said Lady the Queen, in this behalf prosecutes, as to the said *A. B.* On which said day of before our said Lady the [★ 543] ★ Queen comes the said *F.C.*, who prosecutes for our said Lady the Queen in this behalf in his proper person. And the said *A.B.*, although being solemnly called to answer, does not come, nor does he say anything in bar, or in abatement of the said indictment, nor does he in any manner answer to the said indictment, or to the premises in the said indictment specified above charged upon him. Wherefore our said Lady the Queen remains against him the said *A.B.*, without defence in this behalf. Whereupon all and singular the premises being seen and fully understood by the said Court now here, it is considered and adjudged by the said Court here that the said *A.B.* be convicted of the trespass and offence aforesaid, and that he be taken, and so forth.

[C. O. Forms, 116.]

ENTRY OF JUDGMENT ON CONFESSION.

[*See Confession or Plea of Guilty, ante, p.* 530.]

Whereupon all and singular the premises being seen and fully understood by the Queen's Bench Division of Her Majesty's High Court of Justice now here, it is considered and adjudged by

the said Court here, that he, the said *A.B.*, be convicted of the trespress and offence aforesaid. And that for his offences aforesaid he be taken and so forth.

[C. O. Forms, 117.]

ENTRY OF JUDGMENT FOR WANT OF JOINDER IN DEMURRER.

Whereupon all and singular the premises being seen and fully understood by the Queen's Bench Division of Her Majesty's High Court of Justice now here, for that no one comes on behalf of our said Lady the Queen [*or* on behalf of the said *A.B.*, *as the case may be*], further to inform the Court here of the premises, or to join in demurrer with the said *A.B.*, it is considered and adjudged by the said Court here, that the said *A.B.* be dismissed and discharged of and from the premises above specified in the said indictment, and that he depart hence without day in this behalf.

[*The above is in case of demurrer to indictment; in case of demurrer to other proceedings, judgment after conviction, or acquittal, or for the Crown or prosecutor, or for defendant, must be substituted, as the case may be.*]

[C. O. Forms, 118,]

★ ENTRY OF JUDGMENT ON DEMURRER AFTER [★544] ARGUMENT.

Whereupon all and singular the premises being seen and fully understood by the Queen's Bench Division of Her Majesty's High Court of Justice now here, it is considered and adjudged, by the said Court here, that the said plea of the said *A.B.* is bad, and insufficient in law to bar or preclude our said Lady the Queen from further prosecuting the said *A.B.* upon the said information [*or* indictment], and therefore that the said *A.B.* for want of a sufficient plea in this behalf, be convicted of the premises in the information [*or* indictment] within specified, and charged upon him in manner and form as in and by the said information [*or* indictment] is within alleged against him. And that for his offences aforesaid he be taken, and so forth.

[*The above form applies to judgment of conviction upon demurrer to plea to indictment or information. In case of judgment on demurrer to any other proceeding or pleading, the form must be varied accordingly—substituting a judgment of acquittal.*]

[C. O. Forms, 119.]

ENTRY OF A NOLLE PROSEQUI.

Afterwards on day of , before our said Lady the Queen at the Royal Courts of Justice, London, come as well the said coroner and attorney of our said Lady the Queen, in the Queen's Bench Division of Her Majesty's High Court of Justice, who for our said Lady the Queen in this behalf prosecutes in his proper person, as the said *A.B.*, by his solicitor. And the said coroner and attorney for our said Lady the Queen says that he will not further prosecute the said *A.B.* upon the information [*or*

indictment] aforesaid. Whereupon all and singular the premises being seen and fully understood by the Court now here, it is considered and adjudged, by the said Court here, that all proceedings upon the said information [*or* indictment] against the said *A.B.* be altogether stayed, and that the said *A.B.* be discharged of and from the said information [*or* indictment].

[*In the case of an information filed by the Attorney General, his name must be used instead of that of the Queen's coroner and attorney.*]

[C. O. Forms, 120.]

RECOGNIZANCE TO APPEAR FOR SENTENCE.

Be it remembered, that on the day of 188 , [*insert names and descriptions of the defendant and bail, if bail required*], come before me one of Her Majesty's justices of the peace in and for the county of and acknowledge to [★ 545] owe our Sovereign Lady the ★ Queen the several sums following (that is to say), the said the sum of pounds, and the said and the sum of pounds, each of lawful money of Great Britain, to be levied upon their several goods and chattels, lands and tenements, to Her Majesty's use upon condition that if he the said shall personally appear in the Queen's Bench Division of Her Majesty's High Court of Justice on the day of next, or whenever he shall thereto be required in order to receive the sentence of the said Court for certain whereof he is indicted *or* [impeached], and by a jury of the country [*or* by his own default *or* confession] convicted, and so from day to day, and not depart that Court without leave, then this recognizance to be void, or else to remain in full force.

Taken, &c.

[C. O. Forms, 121.]

NOTICE TO CALL A DEFENDANT ON RECOGNIZANCE TO APPEAR FOR SENTENCE.

In the High Court of Justice,
Queen's Bench Division.

[*Middlesex.*]—The Queen
against
A.B.

Take notice that the Queen's Bench Division of Her Majesty's High Court of Justice will be moved on the day of , 188 , or so soon after as counsel can be heard for the judgment of the said Court against the above-named defendant for certain [*conspiracies*] whereof he (with others) is indicted and by a jury of the country [*or* by his own default or confession, *as the case may be*] convicted. And that he, the said defendant, is hereby required personally to attend the said Court in order to receive judgment as aforesaid. And in case the said defendant does not there attend, the said Court will be moved that his default may be recorded, and that the recognizance of the

said defendant and of his bail, entered into this prosecution, be estreated into the Exchequer.

Dated, &c.

(Signed)
M.N.
[Solicitor for the prosecutor.]

To *A.B.*, the above-named defendant; and also to *C.D.*, of, &c., and *E.F.*, &c., his bail.

[C. O. Forms, 122.]

★ RECOGNIZANCE TO PROSECUTE WRIT OF [★ 546] ERROR.

Be it remembered, that on the day of , 188 , *T.H.*, late of , in the county of , but now a prisoner in the custody of [the gaoler of Her Majesty's prison at , in and for the county of], and *H.K.*, of [*merchant*] and *F.S.*, of , [*farmer*], come before me [one of Her Majesty's justices of the peace for the county of (*or as the case may be*)] and acknowledge to owe to our sovereign Lady the Queen the several sums following; that is to say, the said *T.H.* the sum of pounds, and the said *H.K.* and *F.S.* the sum of pounds each, of lawful money of Great Britain, to be levied upon their several goods and chattels, lands and tenements, to Her Majesty's use, upon condition that the said *T.H.* do prosecute with effect a writ of Error [*or* appeal to the House of Lords; *or*, *if writ not obtained*, any writ of error which may hereafter be] issued to reverse the judgment given against the said *T.H.* at [*the last general quarter sessions of the peace in and for the county, holden at on or as the case may be*], upon an indictment for certain misdemeanors, and personally to appear in the Queen's Bench Division of Her Majesty's High Court of Justice [*or* in Her Majesty's Court of Appeal] on the day whereon judgment shall be given upon the said writ of Error. And also, if so ordered by the said last-mentioned Court or by a Judge thereof, four days' notice being given either to the said *T.H.* or his solicitor, or to the bail personally, or by leaving the same at his or their last known place of abode, on the days and times appointed for any proceedings upon the said writ of Error, and so from day to day and not to depart that Court without leave, and forthwith to render the said *T.H.* to prison according to the said judgment, in case the said judgment shall be affirmed, then this recognizance to be void or else to remain in full force.

Taken, &c.

[C. O. Forms, 127.]

ASSIGNMENT OF ERRORS.

[*Heading as in No.* 128, *post*, p. 645 (*a*).]

And now, that is to say, on the day of , in the year of our Lord one thousand eight hundred and eighty-six, before our said Lady the Queen, at the Royal Courts of Justice, London:

Comes the said *A.B.* [in his own proper person], *or*, by [*C.D.*, his solicitor], and says that in the record and proceedings aforesaid, and also in the giving of the judgment against the said

(*a*) Accidentally omitted here.

[★547] *A.B.*, there is ★manifest error in this, to wit:—That [*here set out the first cause of error*] therefore in that there is manifest error. There is also error in this, to wit: That [*set out the second cause of error, and so on, specifying all the assignments of error, commencing and concluding each assignment in the same form as above; and lastly, as general assignments, may be added as follows*]: There is also error in this, to wit: That the indictment and proceedings aforesaid and the matters therein contained are not sufficient in law to warrant the said judgment so given against the said *A.B.*, or to convict him of the trespasses, contempts, nuisances, or offences aforesaid [*as the case may be*], or any or either of them, therefore in that there is manifest error. There is also error in this, to wit: That the judgment aforesaid in form aforesaid is given for our said Lady the Queen. Whereas the said judgment by the law of this realm ought to have been given against our said Lady the Queen and for the said *A.B.*, therefore in that there is manifest error, and the said *A.B.* prays that the judgment aforesaid for the said errors, and other errors appearing in the record and proceedings aforesaid may be reversed, annulled, and wholly held for nothing, and that he may be restored to all things which by reason of the judgment and proceedings aforesaid he has lost.

(Signed) *X. Y.*

[C. O. Forms, 129.]

JOINDER IN ERROR.

[*Same heading.*]

And Frederick Cockburn, Esquire, coroner and attorney of our said Lady the Queen, in the Queen's Bench Division of Her Majesty's High Court of Justice, before the Queen herself, who for our said Lady the Queen in this behalf prosecutes, being present here in Court and having heard the matters aforesaid above assigned for error in manner and form aforesaid for our said Lady the Queen says, that neither in the record and proceedings aforesaid nor in the giving of judgment aforesaid is there any error, therefore the said coroner and attorney of our said Lady the Queen, for our said Lady the Queen, prays that the Court now here may proceed to examine as well the record and proceedings aforesaid, and the judgment thereon given as aforesaid, as the matters above assigned and alleged for error, and that the judgment aforesaid may be in all things affirmed.

[C. O. Forms, 130.]

[★548] ★ATTORNEY-GENERAL'S FIAT FOR WRIT OF ERROR ON INFORMATION, OR INDICTMENT, IN QUEEN'S BENCH DIVISION, &C.

[*Here insert name of county.*]. Let a writ of error on behalf of *E. Y.*, issue directed to the Right Honourable John Duke, Baron Coleridge, Lord Chief Justice of England, and the Honourable the other justices of Her Majesty's High Court attached to the Queen's Bench Division, upon a certain information [or indictment] filed in the said Queen's Bench Division, against the said *E. Y.* for certain misdemeanors whereof he is impeached [or in-

dicted] and by a jury of the county aforesaid [*or* for want of a sufficient plea] convicted, as it is said. And whereupon judgment has been pronounced against him.

Dated, &c.

[C. O. Forms, 134.]

WRIT OF ERROR ON INFORMATION FILED, OR INDICTMENT FOUND, IN QUEEN'S BENCH DIVISION.

VICTORIA, by the Grace of God, &c.

To Our right trusty and well-beloved John Duke, Baron Coleridge, Our Chief Justice of England, the President, and others Our justices of Our High Court attached to the Queen's Bench Division of Our said High Court, greeting: Forasmuch as in the record and proceedings and also in the giving of judgment upon a certain information exhibited in [*or* upon a certain indictment found and filed in] Our said Court before Us against *J. W.*, for certain [misdemeanors], whereupon by a jury [of the county of Middlesex] taken between Us and the said *J. W.* before [you the said John Duke, Baron Coleridge, Our Chief Justice aforesaid] [*or if before some other judge here insert his name*] he is convicted, as it is said, manifest error has intervened to the great damage of the said *J. W.*, as by his complaint We are informed. We, therefore, being willing that the said error (if any there be) be duly amended, and full and speedy justice done to the said *J. W.* in this behalf, do command you that if judgment be given thereupon, then you send to Us distinctly and openly forthwith under your seal, or the seal of one of you to Our Lords Justices of Appeal in Our Court of Appeal, a transcript of the record and proceedings of the information [*or* indictment] aforesaid, with all things touching the same and this writ, that the said transcript and proceedings being inspected, viewed, and examined by Our Lords Justices of Appeal aforesaid, they may cause further to be done thereupon what of right, and ★ according to the [★ 549] law and custom of England shall be meet to be done. Witness Ourself at Westminster the day of in the year of Our reign.

(Signed)

ESHER.

(Master of the Rolls).

Indorsement.

By Sir *A.B.*, Knight, Attorney-General for our Lady the Queen.

[C. O. Forms, 135.]

MEMORANDUM OF ALLOWANCE OF WRIT OF ERROR.

In the High Court of Justice,
Queen's Bench Division.
Middlesex—The Queen
against
A.B.

I have allowed a writ of Error in this prosecution this day of 188 .

(Signed) *C.D.*
[*Title of Officer.*]

[C. O. Forms, 136.]

STATEMENT OF SOME PARTICULAR GROUND OF ERROR TO BE ENGROSSED ON COPY OF ABOVE FOR SERVICE.

One of the grounds of error intended to be argued is [*here state particular ground.*]

[C. O. Forms, 137.]

WRIT OF SUBPŒNA AD TESTIFICANDUM OR DUCES TECUM; GENERAL FORM.

VICTORIA, by the grace of God, &c., to and to every of them, greeting: We command you and every of you, that laying aside all excuses and pretences whatsoever, you and every of you personally be and appear before on the day of instant [*or* next] at the hour of in the noon at in Our said there to testify the truth and give evidence.

*

And this you or any of you are not to omit, under the penalty of one hundred pounds, to be levied on the goods and chattels, lands and tenements of such of you as shall fail herein. Witness, &c.

* *If duces tecum, here add:* And that you or such of you in [★ 550] whose ★custody or power the same be do bring with you and produce before [Our justice or justices] aforesaid [*here describe the document, &c.*]

To be indorsed.

This writ was issued by *M.N.*, of *L.*, agent for *G.H.*, of *Y.*, solicitor for the prosecutor [*or* defendant].

[C. O. Forms, 151.]

WRIT OF SUBPŒNA AT SITTINGS OF HIGH COURT.

VICTORIA, by the grace of God, &c., to and to every of them greeting: We command you and every of you, that laying aside all excuses and pretences whatsoever, you and every of you personally be and appear at the [*Hilary, or as the case may be*] Sittings of the Queen's Bench Division of Our High Court of Justice to be holden at the Royal Courts of Justice, London, on the day of at the hour of in the forenoon of the same day, and so from day to day during the said sittings until the indictment [*or* information] hereinafter mentioned is tried, there to testify the truth and give evidence, [*if for prosecution* on our behalf against *A.B. If for the defence* between Us and *A.B.*], upon an indictment [*or* information] for felony [*or* misdemeanor] [*and if for defence add:* on behalf of the defendant], and so from day to day during the said sittings until the above indictment [*or* information] is tried.

*

And this you or any of you are not to omit, under the penalty of one hundred pounds, to be levied on the goods and chattels, lands and tenements of such of you as shall fail herein. Witness, &c.

* *If duces tecum, here add:* And that you or such of you in whose custody or power the same be do bring with you and produce before Our Chief Justice aforesaid [*here describe the document, &c.*]

[C. O. Forms, 153.]

WRIT OF SUBPŒNA AT ASSIZES ON THE CIVIL SIDE.

VICTORIA, by the grace of God, &c., to and to every of them, greeting: We command you and every of you, that laying aside all excuses and pretences whatsoever, you and every of you personally be and appear before Our justices assigned to hold the assizes in and for Our [county] of on the day of at the hour of in the forenoon, at in Our said county, there to testify and give evidence [*as in No.* 153 *substituting assizes for sittings*].

[C. O. Forms, 154.]

★ WRIT OF SUBPŒNA AT ASSIZES IN THE CROWN COURT. [★ 551]

VICTORIA, by the grace of God, &c., to and to every of them, greeting: We command you and every of you, that laying aside all excuses and pretences whatsoever, you and every of you personally be and appear before * Our justices of oyer and terminer, and general gaol delivery,† and justices assigned to hold the assizes in and for Our [county] of on the day of at the hour of in the forenoon, at in Our said [county], there to testify the truth and give evidence [*if for the prosecution*] on Our behalf against *A.B.* [*or if for the defence* between us and *A.B.*] upon an indictment for felony [*or* misdemeanor] on behalf of the defendant [*if so*], and so from day to day during the said assizes until the above cause is tried.

And this you or any of you are not to omit under the penalty of one hundred pounds to be levied on the goods or chattels, lands and tenements, of you or such of you as shall fail herein.

Witness, &c.

* *Or if before the Grand Jury*, before the Grand Jury of and for Our said county, on Our behalf against *A.B.* upon an indictment for felony [*or* misdemeanor], and also upon the trial of the said *A.B.* for the said offence.

† *If for winter or spring assize counties, say:* in and for Our winter [*or* spring] assize county, No. [seventeen], *and omit* "*and justices assigned, &c.*"

[C. O. Forms, 157.]

WRIT OF SUBPŒNA AT CENTRAL CRIMINAL COURT.

VICTORIA, by the grace of God, &c., to and to every of them, greeting: We command you and every of you, that laying aside all excuses and pretences whatsoever, you and every of you personally be and appear before Our justices of oyer and terminer and gaol delivery, at the sessions of oyer and terminer and gaol delivery, to be holden for the jurisdiction of the Central Criminal Court, at Justice Hall in the Old Bailey, in the suburbs of Our city of London, on the day of at the hour of in the forenoon of the same day, there to testify the truth and give evidence [*as in No.* 157].

[C. O. Forms, 158.]

[★552] ★WRIT OF HABEAS CORPUS TO BRING UP A PRISONER TO PLEAD TO AN INDICTMENT OR FOR TRIAL.

VICTORIA, &c., to the gaoler of Our prison at in and for Our said , greeting: We command you that you have before [*description of Court*] at on the day of at the hour of in the noon the body of being committed and detained in Our prison under your custody as is said, together with the day and cause of his being taken and detained, by whatsoever name he may be called, then and there to answer to [*or* to take his trial upon] an indictment against him for . And so from day to day until he shall have answered as aforesaid [*or* taken his trial as aforesaid]. And to be further dealt with according to law. And have you then there this writ. Witness, &c.

[C. O. Forms, 188.]

WRIT OF HABEAS CORPUS TO BRING A PRISONER TO THE CROWN OFFICE TO ATTEND THE NOMINATION, &C. OF A SPECIAL JURY.

VICTORIA, by the grace of God, &c., to the gaoler of Our prison of greeting: We command you that you have the body of , being detained in Our prison under your custody, before Frederick Cockburn, Esquire, Queen's coroner and attorney in the Queen's Bench Division of Our High Court of Justice before Us on the day of at the hour of in the noon, at the Crown Office, Royal Courts of Justice, London; there to attend the nomination of forty-eight good and lawful men out of the book or list of persons qualified to serve on special juries within the county of , as and for a jury to be taken between Us and the said upon an information exhibited against him in Our Court before Us, by the said Frederick Cockburn, Queen's coroner and attorney as aforesaid, for certain [*or* upon an indictment against him for certain ;] and so from day to day until the same jury shall be reduced, and when the said shall have so attended the nomination and reduction of the said jury, that then you cause him to be brought back without delay to Our said prison, and cause him to be detained therein under safe custody until he shall be from thence discharged by due course of law. Witness, &c.

[C. O. Forms, 189.]

[★553] ★WRIT OF ATTACHMENT.

VICTORIA, by the grace of God, &c., to the sheriff of , greeting: We command you to attach *C. D.*, so that you may have him before Us in the Queen's Bench Division of our High Court of Justice, at the Royal Courts of Justice, London, on the day of 188 , to answer to Us for certain trespasses and contempts brought against him in Our said Court; and have you there then this writ. Witness, &c.

[C. O. Forms, 190.]

AFFIDAVIT FOR HABEAS CORPUS TO BRING UP A PRISONER TO BE CHARGED WITH ATTACHMENT.

In the Queen's Bench.

England.—The Queen
against
A.B.

I, *G.H.*, of, &c., clerk to *I.J.* of, &c., the solicitor for the prosecutor in this cause, make oath and say :—

1. That on the day of last, a writ of attachment was granted by, and duly issued out of, this honourable Court, directed to the sheriff of against the above-named defendant for his contempt in not [*describe the nature of the contempt*].

2. That the said defendant is a prisoner for now confined in Her Majesty's prison at of and for .

3. That the prosecutor is desirous that the said defendant should be brought before this honourable Court [*or* a Judge in Chambers at the Royal Courts of Justice, London], in order that he may be charged with and committed upon the said attachment.

Sworn, &c.

[C. O. Forms, 191.]

WRIT OF HABEAS CORPUS ON RETURN OF CEPI CORPUS.

VICTORIA, by the Grace of God, &c., to the sheriff of , greeting : We command you that you have the body of before Us in the Queen's Bench Division of Our High Court of Justice, at the Royal Courts of Justice, London, forthwith after the receipt of this Our writ, to answer to Us for certain trespasses and contempts brought against him in Our said Court before Us, and whereof by your return sent to Us you have charged yourself. And have you then there this writ.

Witness, &c.

[C. O. Forms, 192.]

★ AFFIDAVIT OF PERSONAL SERVICE OF WRIT. [★ 554]

[*Heading as in No.* 199, *ante*, p. 499.]

I, *A.B.*, of, &c., make oath and say :—

That I did on the day of , personally serve *C.D.* named in the writ of hereunto annexed with the said writ, and which said writ appeared to this deponent to be duly and regularly issued out of, and under the seal of this honourable Court, by delivering a true copy of such writ to the said personally, at in the county of . And at the same time showing to the said *C.D.*, the said original writ.

Sworn, &c.

[C. O. Forms, 202.]

AFFIDAVIT OF SERVICE OF SUBPŒNA.

[*Same Heading.*]

I, *A.B.*, of &c. make oath and say :—

That I did on the day of personally serve *C.D.*, one of the persons to whom the writ of subpœna hereunto annexed,

marked (A.), is directed, with the said writ, by delivering a true copy of the said writ to the said *C.D.* at in the county of . And at the same time showing to the said *C.D.* the said original writ. And at the time of such service gave to the said *C.D.* the sum of for conduct money.

Sworn, &c.

[C. O. Forms, 203.]

AFFIDAVIT OF SERVICE OF ORDER AND MASTER'S ALLOCATUR AND DEMAND AND NON-PAYMENT OF MONEY, TO ESTREAT RECOGNIZANCE.

In the High Court of Justice,
Queen's Bench Division.

[*Middlesex.*—The Queen
against
X.Y.

I, *A.B.*, of &c., make oath and say :—

1. That I , did, on the day of 188 , personally serve named in the order of Court hereunto annexed, with the said order and the allocatur of the Queen's coroner and attorney in this Court [*or* of the master of the Crown Office] for [★ 555] the sum of ★ made thereon, by delivering a true copy of the said order and allocatur to the said at in the county of , and at the same time showing to the said the said original order and the said allocatur. And I did, at the same time, demand of the said the said sum of , the amount of the said allocatur ; but the said did not then pay the same, or any part thereof, to this deponent ; nor has he, the said , at any time since paid the same, or any part thereof, to the prosecutor in this cause, or to any one on his behalf, as I have been informed by the said prosecutor, and verily believe. And the said sum of still remains due and unpaid to the said prosecutor, or to me, his solicitor.

2. And that I did also, on the day of 188 , personally serve one of the bail of the said defendant in this cause, with the said order and allocatur, by delivering a true copy of the said order and allocatur to the said at the residence of the said at in the county of and at the same time showing to the said the said original order and allocatur. And I did, at the same time, demand of the said the said sum of , but the said did not then pay the same, or any port thereof, to this deponent, nor has he, the said , at any time since, paid the same, or any part thereof, to me, or to the prosecutor in this cause, or to any one on his behalf, as I have been informed by the said prosecutor, and verily believe.

3. That I did on the day of 188 , personally serve the other bail of the said defendant, with the said order and allocatur, by delivering a true copy of the said order and allocatur to the said , at in the county of and at the same time showing to the said the said original order and allocatur. And I did, at the same time, demand of the said the said sum of but the said did not then pay the same, or any part thereof, to me, nor has he, the said , at any time since paid the same, or any part thereof, to this deponent, or to the said prosecutor, or

to any one on his behalf, as I have been informed by the said prosecutor, and verily believe. And that the said sum of still remains unpaid.

Sworn, &c.

[C. O. Forms, 204.]

NOTICE OF MOTION FOR AN INFORMATION QUO WARRANTO FOR CORPORATE OFFICE WITHIN 45 & 46 VICT. C. 50, s. 225.

In the High Court of Justice,
Queen's Bench Division.

Take notice, that the Queen's Bench Division of Her Majesty's High Court of Justice will be moved on the day of 188 , ★ or so soon after as counsel can be heard, on [★ 556] behalf of *A.B.*, of , merchant [*or as the case may be*], that an information in the nature of a *quo warranto* be exhibited against you, *C.D.*, to show by what authority you claim to exercise the office or franchise of a of , on the ground :—That [*here shortly state the grounds of the application*].

And further take notice, that in support of this application will be read the affidavits of *E.E.* and another and *G.G.*, sworn respectively the day of May, 188 , and the exhibits therein referred to, copies of which are served herewith.

Dated, &c.

(Signed)
X.Y., of *Z.*, agent for *M.N.*, of *S.*
solicitor for the above-named *A.B.*

To *C.D.*
of *T.*

[C. O. Forms, 34.]

ORDER NISI FOR A QUO WARRANTO INFORMATION.

The of A.D. 188 .
In the High Court of Justice,
Queen's Bench Division.
[*Somerset.*]

Upon reading the affidavits of it is ordered that day the day of next, be given to to show cause why an information in the nature of a *quo warranto* should not be exhibited against him to show by what authority he claims to exercise the office or franchise of , upon the grounds [*here set forth all the grounds relied on. See C. O. Rule*, 55], upon notice of this order to be given to him in the meantime.

On the motion of Mr.

By the Court.

AFFIDAVITS OF SERVICE OF ORDER NISI.

[*See the Forms, ante, p.* 500.]

ORDER DISCHARGING OR MAKING ABSOLUTE ORDER NISI.

[*These can be adapted from the Forms, ante pp.* 501, 502.]

[★ 557] ★ RECOGNIZANCE TO PROSECUTE INFORMATION QUO WARRANTO.

[*Similar to No.* 27, *except that the information must be described as*] a certain information in the nature of a *quo warranto* exhibited against the said *C. D.* by the said Frederick Cockburn on the relation of the said *A. B.* in the said Court to show by what authority he claims to exercise the office of a [*member of the Local Board for the district of in the county of or as the case may be*] whereof he is impeached and to abide by and observe all such orders and things as the said Court shall direct in that behalf.

Taken, &c.

[C. O. Forms, 28.]

INFORMATION QUO WARRANTO AGAINST A MEMBER OF A SCHOOL BOARD.

Cheshire, to wit,

Be it remembered that Frederick Cockburn, Esquire, coroner and attorney of our present Sovereign Lady the Queen, in the Queen's Bench Division of Her Majesty's High Court of Justice before the Queen herself, who for our said Lady the Queen in this behalf prosecutes, in his own proper person comes here into Court before the Queen herself at the Royal Courts of Justice, London, on the day of , in the year of our Lord one thousand eight hundred and eighty , and for our Lady the Queen at the relation of *A. B.* of , according to the form of the Statute in such case made and provided, gives the Court here to understand and be informed that [*the parish of , in the county of , is a school district within the meaning of the Elementary Education Acts,* 1870 *and* 1873. *And that within the said parish and school district of , pursuant to the provisions of the said Acts, divers, to wit, nine members* [*or as the case may be*] *are to be elected for and as the school board for the said parish and school district, in manner by the said Acts provided, and in accordance with the rules, orders, and regulations of the Lords of the Committee of the Privy Council on Education in that behalf dated* (*the third day of October one thousand eight hundred and seventy-three*),] and that the place and office of [*member of the school board of the said parish and school district*] is a public office and place of great trust and pre-eminence within the said [*parish and school district*], touching the rule and government of the said [*school district*], that is to say, at the [*parish*] of aforesaid, in the county aforesaid. And that *C. D.*, of , in the said county [merchant, *or as the case may be*], heretofore to wit on the day of in the year of our Lord one thousand eight hundred and eighty-six. at the [★ 558] [*parish*] aforesaid in the county ★ aforesaid, did use and exercise and from thence continually afterwards to the time of exhibiting this information has there used and exercised, and still does there use and exercise, without any legal warrant, authority, or right whatsoever, the office of [*member of the school board of the said parish and school district of*], in the county

Date of order absolute.

aforesaid, and for and during all the time last above-mentioned, has there claimed and still does claim to be a [*member of the said school board of the said parish and school district*], and to have, use, and exercise all the privileges and perform all the duties belonging and appertaining to the said office of [*member of the said school board*], which said offices, privileges, and duties he, the said *C. D.*, for and during all the time last above mentioned, upon our said Lady the Queen without any legal warrant, authority, or right whatsoever has usurped and still does usurp, that is to say, at the [*parish*] of , in the county aforesaid, in contempt of our said Lady the Queen to the great damage and prejudice of Her royal prerogative and against Her Crown and dignity. Whereupon the said coroner and attorney of our said Lady the Queen for our said lady the Queen prays the consideration of the Court here in the premises. And that due course of law may be awarded against him, the said *C. D.*, in this behalf to make him answer to our said Lady the Queen, and show by what authority he claims to have, use, and enjoy, and perform the office, liberties, privileges, and duties aforesaid.

(Signed)
F. COCKBURN,
(Queen's Coroner and Attorney.)

[C. O. Forms, 32.]

INFORMATION QUO WARRANTO AGAINST MUNICIPAL CORPORATE OFFICERS.

Borough of , to wit.

Be it remembered that, &c. [*proceed as in last form.*]

That the borough [*or* city] of is a borough subject to the provisions of the Municipal Corporations act, 1882 [*if subject to the provisions of any other act it should be stated*], and that within the said borough [*or* city] pursuant to the provisions of the said Act there of right ought to be one mayor, [*six*] aldermen and [*eighteen*] councillors, to be elected in the manner in the said Act specified; and that the place and office of [mayor] [alderman] [*or* a councillor] of the said borough is a public office, and a place and office of great trust and pre-eminence within the said borough, touching the rule and government of the said borough [*and the administration of public justice within the same*], that is to say, at the borough of , in the said county. ★ And [★ 559] that *C. D.*, of the borough aforesaid, in the county aforesaid, [merchant], heretofore, to wit, on the day of in the year of our Lord one thousand eight hundred and eighty , at the borough of aforesaid, in the county aforesaid, did use and exercise and from thence continually afterwards to the time of exhibiting this information has there used and exercised, and still does there use and exercise, without any legal warrant, royal grant, or right whatsoever, the office of of the said borough, and for and during all the time last above mentioned had there claimed, and still does there claim, without any legal warrant, royal grant, or right whatsoever, to be of the said borough, and to have, use, and enjoy all the liberties, privileges, and franchises, to the office of of the said borough, belonging and appertaining, which said office, liberties, privileges, and franchises, he the said *C. D.* for and during all the time last above-mentioned upon our said Lady the Queen, without any legal warrant, royal grant, or right whatsoever, has usurped and still does usurp, that

is to say, at the borough of aforesaid, in the county aforesaid, in contempt of our said Lady the Queen, to the great damage and prejudice of Her royal prerogative and also against Her Crown and dignity. Whereupon the said coroner and attorney of our said Lady the Queen, for our said Lady the Queen, prays the consideration of the Court here in the premises. And that due process of law may be awarded against him the said *C. D.*, in this behalf to make him answer to our said Lady the Queen, and show by what authority he claims to have, use, and enjoy, the office, liberties, privileges, and franchises aforesaid.

(Signed)
F. COCKBURN,
(Queen's Coroner and Attorney).

[C. O. Forms, 33.]

[*This form can be easily adapted to the case of a Town Clerk or Recorder.*]

DISCLAIMER UPON AN INFORMATION QUO WARRANTO.

In the High Court of Justice,
Queen's Bench Division.

[*Lincolnshire.*]—The Queen on the relation of *A.B.*
against
C.D.

And now, that is to say, on the day of 188 , comes the above-named *C. D.* by his solicitor [*or* in his own proper person], and says that he altogether disclaims and dis- [★ 560] avows the office, ★ liberties, privileges, and franchises in the said information above specified, and cannot deny but that he has usurped upon our said Lady the Queen, without any legal warrant, royal grant or right whatsoever, the said office, liberties, privileges, and franchises in the said information above mentioned, and confesses and acknowledges the said usurpation, in manner and form as in the said information is above alleged.

(Signed)
C.D.
[*or by his Counsel.*]

[C. O. Forms, 35.]

WRIT OF SUBPŒNA, TO ANSWER ON INFORMATION.

[See C. O. Forms, 51, *ante*, p. 512.]

WRIT OF SUBPŒNA ON TRIAL OF ISSUES ON QUO WARRANTO INFORMATION.

[*As in No.* 153 *or No.* 154, *ante*, p. 550.]

But instead of "upon an indictment for" say: upon an information in the nature of a *quo warranto* exhibited against him the said in the [said] Queen's Bench Division of Our High Court of Justice before Us, to show by what authority he claims to be whereof he is impeached.

JUDGMENT OF OUSTER ON DISCLAIMER TO QUO WARRANTO.

[*Heading as in last.*]

The day of 188 .

The defendant having, on the day of 188 , entered a disclaimer upon this information, It is this day adjudged that he, the said *C.D.*, do not in any manner intermeddle, &c. [*proceed as in form for judgment on quo warranto form* 123.]

[C. O. Forms, 36.]

★ JUDGMENT FOR THE CROWN ON QUO WARRANTO AFTER TRIAL WITH A JURY. [★561]

In the High Court of Justice,
Queen's Bench Division.
[*Middlesex.*]—The Queen, on the relation of *A.B.*,
against
C.D.

15th April, 188 .

The information in this prosecution having, on the 12th and 13th days of April 188 , been tried before the Honourable Mr. Justice with a [special] jury of the county of , and the jury having found [*state findings as in officer's certificate*], and the said Mr. Justice having ordered that judgment be entered for the Crown with costs [*or as the case may be*]: Therefore it is adjudged that the defendant *C.D.* do not in any manner intermeddle with or concern himself about the office, liberties, privileges, and franchises in respect of which the said information has been filed, but that he be absolutely forejudged and excluded from exercising or using the same or any of them for the future. And that the said *A.B.*, the relator above-mentioned, do recover against the said *C.D.*, his costs in this behalf to be taxed.

The above costs have been taxed and allowed at £ , as appears by the master's allocatur dated at the day of 188 .

[C. O. Forms, 123.]

NOTICE OF MOTION ON APPEAL TO COURT OF APPEAL.

In the Court of Appeal.
[*Yorkshire.*]—The Queen on the relation of *A.B.*
against
C.D.

Take notice that this Honourable Court will be moved on [day] the day of next, or so soon thereafter as counsel can be heard by Mr. of counsel for the above-named defendant *C.D.* [*or* relator *A.B.*] on his behalf, that the judgment [*or* order] of the Queen's Bench Division of the High Court of Justice made herein and dated the day of 188 , [*or if only part of the judgment or order is appealed from, say*, "that so much of the judgment (*or* order) of the Queen's Bench Division of the High Court of Justice made herein and dated, &c., as adjudges (*or* directs *or* orders, *as the case may be*) that [*here set out the part or parts of the judgment* ★ *or* [★562]

order which are appealed from] may be reversed [*or* rescinded], and that [*here set out the relief or remedy, if any, sought as for instance* "that it may be adjudged (*or* ordered) that," &c., *as the case may be.*

Dated this day of 18 .

Yours, &c.,

M.N.,
Solicitor [*or* Agent for *X.Y.*, solicitor] for the above-named defendant [*or* relator.]

To *A.B.*, the above-named
relator [*or* equivalent],
and to Mr. *O.P.*, his
solicitor or agent.

[Adapted from Chitty's Forms (11th Ed.), pp. 453–455.]

For forms of (1) Notice of motion for leave to appeal after time has expired; (2) Notice of motion to dismiss appeal in default of security for want of prosecution; (4) Notice of motion to stay proceedings pending appeal; (5) Notice by respondent of intention to contend that the decision of the court below should be varied; and (6) Notice of intention to apply for leave to produce fresh evidence at the hearing of the appeal, see Chitty's Forms (11th Ed.), pp. 455–460. The alterations requisite to be made in these forms will appear from the form of notice of motion on appeal above set forth.

WRIT OF MANDAMUS.

VICTORIA, by the grace of God, &c.
to
of
greeting.

Whereas by [*here recite Act of Parliament, or Charter, if the act required to be done is founded on either one or the other*]. And whereas We have been given to understand and are informed in the Queen's Bench Division of Our High Court of Justice before Us, that [*insert necessary inducement and averments*]. And you the said were then and there required by [*insert demand*], but that you the said well knowing the premises, but not regarding your duty in that behalf then and there wholly neglected and refused to [*insert refusal*] nor have you or any of you at any time since in contempt of Us and to the great damage and grievance of as We have been informed from their complaint made to Us. Whereupon We, being willing that due and speedy justice should be done in the premises as it is [★ 563] reasonable, do command you the said and ★ every of you firmly enjoining you that you [*insert command*] or that you show Us cause to the contrary thereof, lest by your default the same complaint should be repeated to Us. And how you shall have executed this Our writ make known to Us in Our said Court at the Royal Courts of Justice, London, forthwith then returning to Us this Our said writ, and this you are not to omit.

Witness, &c.

To be indorsed.

By order of Court [*or* of Mr. Justice].
At the instance of
This writ was issued by. &c.

[C. O. Forms, 37.]

MANDAMUS TO ELECT MUNICIPAL OFFICERS.

VICTORIA, by the Grace of God, &c.
to the mayor, aldermen and burgesses (*a*) of Our borough of in the county of , greeting.

Whereas Our said borough of is a borough subject to the provisions of the Municipal Corporations Act, 1882 [if subject to the provisions of any other Act, state it also], within which said borough, according to the provisions of the said Act of Parliament there of right ought to be one mayor, aldermen and councillors, to be elected in the manner in the said Act specified.

And whereas, We have been given to understand and are informed in the Queen's Bench Division of Our High Court of Justice before Us that on the day of now last past, the of the said borough went out of office in pursuance of the provisions of the said Act of Parliament. And that no due election of any persons to be *or* of any person to be an of the said borough in the place and stead of such who had so gone out of office or of any of them was had or holden the day of . Nor hath any election of any or of an of the said borough, in the place and stead of such who has so gone out of office as aforesaid been since at any time made whereby the places and offices of of the said borough since the day of have been and still are vacant, to the manifest hindrance and obstruction of the public government of the said borough. Whereupon We, being willing that due and speedy justice should be done in the premises, as it is reasonable, do command you the said mayor, aldermen and burgesses of the said borough of and every of you, firmly enjoining you that you and every of you having a right to vote or ★ to do any other act necessary to be done in order [★ 564] to the election of of the said borough do upon the day of , meet and assemble yourselves together in the Guildhall of the said borough. And that being so assembled you or such of you to whom the same doth of right belong, do then and there proceed to the election of in the place and stead of of the said borough, who have so gone out of office as aforesaid, according to the directions of the said Act of Parliament. And that you or such of you to whom the same doth of right belong, do administer or cause to be administered to the several persons who shall be so elected of the said borough, the oath [*or* declaration] (*b*) in that behalf enacted by the said Act to be made and subscribed. And that you admit or cause to be admitted the same several persons respectively into the office of of the said borough, together with all the liberties, privileges and franchises to the said places and offices respectively belonging and appertaining. And that you and every of you do every Act necessary to be done by you or any of you in order to the due election and admission of of the said borough, according to your authority in that behalf respectively, or that you shew Us cause to the contrary thereof, lest by your default the same complaint should be repeated to Us. And how

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(*a*) In the case of a city, the title of the corporation is "the mayor, aldermen, and citizens" (Municipal Corporations Act, 1882, s. 8.)

(*b*) Only such municipal officer as is to act as justice of the peace is now obliged to take an oath or make a declaration. See 31 & 32 Vict. c. 72, ss. 5 and 9, and Shed. Part II.

you shall have executed this Our writ, make known to us in the Queen's Bench Division of Our High Court of Justice at the Royal Courts of Justice, London, forthwith then returning to Us this Our said writ, and this you are not to omit.

Witness, &c.

To be indorsed.

By order of Court [*or* of Mr. Justice].
At the instance of
This writ was issued by, &c.

[For form of Mandamus to a railway company to purchase the necessary lands to complete their line, see *R.* v. *Great Western Ry. Co.*, 16 Q. B. 864, 1 E. & B. 253.

See also form of Return in the same case.

Form of Mandamus (and Return) to a railway company to make a bridge and carry the road over it: *R.* v. *Caledonian Ry. Co.*, 16 Q. B. 19.

Mandamus (and Return) to admit to the office of warden of a college: *R.* v. *Dulwich*, 17 Q. B. 600.

Mandamus (and Return) to a lord of a manor and his steward to admit a copyholder: *R.* v. *Corbett*, 1 E. & B. 836; *R.* v. *Dendy*, 1 E. & B. 829.]

[★ 565] ★ RETURN TO WRIT OF MANDAMUS.

The return may either be indorsed on the back of the original writ, or engrossed on a separate parchment schedule.

When indorsed on the back of the original writ.

The answer of [*the parties to whom the writ is directed*] to this writ. We, the, &c. [*the defendants*] to whom this writ is directed, do most humbly certify that and return to our Sovereign Lady the Queen at the time and place in this writ mentioned, that we have, &c. [*when the return is an obedience to the writ, the words of the mandatory part of the writ should be recapitulated in the past instead of the future tense*]. As by the said writ we are commanded.

(*To be signed by the parties making the return, or a sufficient number to form a quorum, unless they be a corporate body, in which case it is sufficient to attach the corporate seal.*)

When the return is engrossed on a separate schedule.

Indorse the original writ [*or the copy served*] *thus:*

The return of to this writ [*or if the return is obedience, say, the execution of this writ*] appears in the schedule hereunto annexed.

The answer of

To be signed or sealed as above.]

[C. O. Forms, 38.]

[For a return in the nature of a demurrer: see *R.* v. *St. Pancras*, 6 A. & E. 316.]

[For other forms of return, see cases referred to p. 564.]

JUDGMENT FOR THE CROWN ON MANDAMUS AFTER TRIAL WITH A JURY.

In the High Court of Justice,
Queen's Bench Division.
[*Insert name of county*]—The Queen, on the prosecution of
A.B., Plaintiff.
against
C.D., Defendant.

30th March, 188 .

The issue on this writ of mandamus having on the day of 188 . been tried before the Honourable Mr. Justice , with a [special] jury of the county of, , and the jury having found [*state findings as in officer's certificate*] and the said Mr. Justice having ordered that judgment be entered for the Crown with costs ★ [*or as the case may be*]. [★ 566] Therefore it is adjudged that a peremptory writ of mandamus be awarded in this behalf, and that the plaintiff do recover against his costs to be taxed.

The above costs have been taxed and allowed at £ , as appears by the master's allocatur dated the day of 188 .

[C. O. Forms, 124.]

WRIT OF SUBPŒNA ON TRIAL OF ISSUE ON MANDAMUS.

[*As in No.* 153 *or* 154, *ante, p.* 550.]

And after the word "evidence" insert:—

between the Queen on the prosecution of *A.B.*, plaintiff, and *C.D.* and *E.F.*, &c., defendants, upon the trial of certain issues joined between the said parties upon the return to Our writ of Mandamus lately issued out of the [said] Queen's Bench Division of Our High Court of Justice directed to the said commanding them [*or* him] to [*here shortly set out mandatory part of writ*] on behalf of the plaintiff [*or* defendant.]

WRIT OF PROHIBITION.

VICTORIA, by the Grace of God, &c., to [*the keepers of Our peace and Our justices assigned to hear and determine divers crimes, trespasses, and other offences committed within Our county of*], greeting.

Whereas We have been given to understand that you the said [*justices have entered an appeal by A.B. against, &c.* And that the said has no jurisdiction to hear and determine the said by reason that [*here state facts showing want of jurisdiction*].

We therefore hereby prohibit you from further proceeding in the said

Witness, &c.

This writ was issued by, &c.

[C. O. Forms, 39].

CROWN OFFICE RULES, 1886.

The following Orders and Rules may be cited as the Crown Office Rules, 1886. They shall come into operation on the 28th day of April, 1886, and shall also apply, so far as may be practicable (unless otherwise expressly provided), to all proceedings taken on or after that day in all matters then pending.

1. All existing rules or practice on the Crown side inconsistent [★ 567] ★with these Rules are hereby repealed, and the following Rules shall henceforth be in force.

2. No order or rule annulled by any former order shall be revived by any of these Rules, unless expressly so declared; and where no other provision is made by these Rules, the present procedure and practice remain in force.

CUSTODY OF RECORDS.

3. The Queen's coroner and attorney, and the master of the Crown Office, Queen's Bench Division, shall have the care and custody of the records and other proceedings on the Crown side.

DATE OF PROCEEDINGS.

4. Every order and other proceeding on the Crown side shall be dated of the day of the week, month, and year on which the some was made, unless the Court or a judge shall otherwise direct, and shall take effect accordingly.

AFFIDAVITS.

5. Order XXXVIII. (affidavits) of the Rules of the Supreme Court, 1883, shall, as far as it is applicable, apply to all civil proceedings on the Crown side.

The following Rules shall apply to all proceedings on the Crown side.

6. Upon any motion or summons evidence may be given by affidavit; but the Court or a judge may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit.

7. Affidavits used on the Crown side shall be intituled "In the High Court of Justice, Queen's Bench Division."

8. Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted. The costs of every affidavit which shall unnecessarily set forth matters of hearsay, or argumentative matter, or copies of or extracts from documents, shall be paid by the party filing the same.

9. Affidavits sworn in England shall be sworn before a judge, district registrar, commissioner to administer oaths, first or [★ 568] second class ★ clerk in the Crown Office Department, or officer empowered under the Rules of the Supreme Court to administer oaths.

10. Every commissioner to administer oaths shall express the

time when, and the place where, he shall take any affidavit or recognizance; otherwise the same shall not be admitted to be filed without the leave of the Court or a judge; and every such commissioner shall express the time when, and the place where, he shall do any other act incident to his office.

11. All affidavits, declarations, affirmations, and attestations of honour in causes or matters depending on the Crown side may be sworn and taken in Scotland or Ireland or the Channel Islands, or in any colony, island, plantation, or place under the dominion of Her Majesty in foreign parts, before any judge, court, notary public, or person lawfully authorized to administer oaths in such country, colony, island, plantation, or place respectively, or before any of Her Majesty's consuls or vice-consuls in any foreign parts out of Her Majesty's dominions; and the judges and other officers of the High Court shall take judicial notice of the seal or signature, as the case may be, of any such Court, judge, notary public, person, consul, or vice-consul, attached, appended, or subscribed to any such affidavits, affirmations, attestations of honour, declarations, or to any other document.

12. Every affidavit shall be drawn up in the first person, and shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and as nearly as may be shall be confined to a distinct portion of the subject. Every affidavit shall be written or printed bookwise. No costs shall be allowed for any affidavit or part of an affidavit substantially departing from this rule.

13. Every affidavit shall state the description and true place of abode of the deponent.

14. In every affidavit made by two or more deponents the names of the several persons making the affidavit shall be inserted in the jurat, except that if the affidavit of all the deponents is taken at one time by the same officer it shall be sufficient to state that it was sworn by both (or all) of the "above-named" deponents.

15. Every affidavit used on the Crown side shall be filed in the Crown Office Department of the Central Office. There shall be indorsed on every affidavit a note shewing on whose behalf it is filed, and no affidavit shall be filed or used without such note, unless the Court or a judge shall otherwise direct.

16. The Court or a judge may order to be struck out from any affidavit any matter which is scandalous, and may order the costs of any application to strike out such matter to be paid as between solicitor and client.

★ 17. No affidavit having in the jurat or body thereof [★ 569] any interlineation, alteration, or erasure shall, without leave of the Court or a judge, be read or made use of in any matter depending in Court, unless the interlineation or alteration (other than by erasure) is authenticated by the initials of the officer taking the affidavit, or if taken at the Crown Office Department, either by his initials or by the stamp of that office; nor in the case of an erasure, unless the words or figures appearing at the time of taking the affidavit to be written on the erasure are re-written and signed or initialed in the margin of the affidavit by the officer taking it.

18. Where an affidavit is sworn by any person who appears to the officer taking the affidavit to be illiterate or blind, the officer shall certify in the jurat that the affidavit was read in his presence to the deponent, that the deponent seemed perfectly to understand it, and that the deponent made his signature in the

presence of the officer. No such affidavit shall be used in evidence in the absence of this certificate, unless the Court or a judge is otherwise satisfied that the affidavit was read over to and appeared to be perfectly understood by the deponent.

19. The Court or a judge may receive any affidavit sworn for the purpose of being used in any cause or matter, notwithstanding any defect by misdescription of parties or otherwise in the title or jurat, or any other irregularity in the form thereof; and may direct a memorandum to be made on the document that it has been so received.

20. In cases in which by the present practice an original affidavit is allowed to be used, it shall before it is used be stamped with a proper filing stamp, and shall at the time when it is used be delivered to and left with the proper officer in Court or in Chambers, who shall send it to be filed. An office copy of an affidavit may, in all cases in which a copy is admissible, be used, the original affidavit having been previously filed, and the copy duly authenticated with the seal of the office.

21. No affidavit shall be sufficient if sworn before the solicitor acting for the party on whose behalf the affidavit is to be used, or before any agent or correspondent of such solicitor, or before the party himself.

22. Any affidavit which would be insufficient if sworn before the solicitor himself shall be insufficient if sworn before his clerk or partner.

23. Where a special time is limited for filing affidavits, no affidavit filed after that time shall be used, unless by leave of the Court or a judge.

24. Except by leave of the Court or a judge no order made *ex* [★ 570] ★ *parte* in Court founded on any affidavit shall be of any force, unless the affidavit on which the application was made was actually made before the order was applied for, and produced or filed at the time of making the motion.

25. Upon motions founded upon affidavits, either party may apply to the Court or a judge for leave to make additional affidavits upon any new matter arising out of the affidavits of the opposite party; but no additional affidavits shall be used except such leave shall have been first obtained.

26. No person shall be allowed to shew cause against an order *nisi*, unless he shall have previously obtained office copies of such order and of the affidavits upon which it was granted.

27. Affidavits of service shall state when, where and how and by whom, such service was affected.

[28—42 *relate to Certiorari.*]

INDICTMENTS AND INFORMATION.

43. Every indictment found by the grand jury in the Queen's Bench Division may, if necessary, be certified to a judge, in order that such judge may (if he thinks proper) immediately issue his warrant for the apprehending of the defendant.

44. If any defendant in any indictment or information depending in the Queen's Bench Division shall be committed to prison, and detained for want of bail for his appearance, to such indictment, or information, for the space of one calendar month next following such commitment, and the prosecutor of such in-

dictment or information shall not proceed within that time, such defendant shall after the expiration thereof be discharged by order of the Court or a judge upon entering a common appearance to the said indictment or information (unless good cause shall be shewn to the contrary). Eight days' notice shall be given by the defendant or his solicitor of his intention to apply for such order.

45. If any such defendant shall be convicted upon any such indictment or information as in the last preceding rule mentioned, and shall be afterwards committed or detained for want of bail, the prosecutor shall cause him to be brought up for judgment within eight days after the time limited by Rule 166 for moving for a new trial if the Court be then sitting, and if the Court be not sitting, within the first eight days of the sittings next after that in which the trial was had, and in default of his doing so within that time, or within such ★ further time as may have [★ 571] been granted by the Court or a judge for that purpose, the defendant may on application to the Court be discharged on his own recognizance.

46. With the exception of *ex-officio* informations filed by the Attorney-General on behalf of the Crown, no criminal information or information in the nature of a *quo warranto* shall be exhibited, received, or filed at the Crown Office Department without express order of the Queen's Bench Division in open Court, nor shall any process be issued upon any information other than an *ex-officio* information, until the person procuring such information to be exhibited shall have filed at the Crown Office Department a recognizance in the penalty of £50 effectually to prosecute such information and to abide by and observe such orders as the Court shall direct, such recognizance to be entered into before the Queen's coroner and attorney or the master of the Crown Office, or a justice of the peace of the county, borough, or place in which the cause may have arisen.

47. No application shall be made for a criminal information against a justice of the peace for misconduct in his magisterial capacity unless a notice containing a distinct statement of the grievances, or acts of misconduct complained of, be served personally upon him, or left at his residence, with some member of his household, six days before the time named in it for making the application.

48. The application for a criminal information shall be made to a Divisional Court by a motion for an order *nisi*, within a reasonable time after the offence complained of; and if the application be made against a justice of the peace for misconduct in his magisterial capacity, the applicant must depose on affidavit to his belief that the defendant was actuated by corrupt motives, and further, if for an unjust conviction, that the defendant is innocent of the charge.

49. If the prosecutor on any information not *ex-officio* does not proceed to trial within a year after issue joined, or if the prosecutor causes a *nolle prosequi* to be entered, or if the defendant be acquitted (unless the judge at the time of trial certifies that there was reasonable cause for the information), the Court, on motion for the same may award the defendant his costs to the amount of the recognizance entered into by the prosecutor on filing the information.

50. If, on any indictment in the Queen's Bench Division, or information by a private prosecutor, for the publication of any defamatory libel, judgment shall be given for the defendant, he

shall be entitled to recover from the prosecutor the costs sustained by the said defendant by reason of such indictment or information; and upon a special plea of justification to such indict- [★ 572] ment or information, if the ★ issue be found for the prosecutor, he shall be entitled to recover from the defendant the costs sustained by the prosecutor by reason of such plea.

QUO WARRANTO.

51. Every application for an information in the nature of a *quo warranto* shall be by motion to a Divisional Court for an order *nisi*, unless the same be *ex-officio* or be made in respect of a corporate office within the meaning of 45 & 46 Vict. c. 50, s. 225.

52. In respect of such a corporate office as in the last preceding Rule mentioned, the application shall be by notice of motion to the person affected thereby, to be served not less than ten days before the day specified in the notice for making the application.

53. The notice shall set forth the name and description of the applicant, and a statement of the grounds of the application, and the applicant shall deliver with the notice, on service thereof, a copy of the affidavits whereby the application will be supported.

54. No order for filing any information in the nature of a *quo warranto* shall be granted, unless at the time of moving an affidavit be produced by which some person shall depose upon oath that such motion is made at his instance as relator; and such person shall be deemed to be the relator in case such order shall be made absolute, and shall be named as such relator in such information in case the same shall be filed, unless the Court shall otherwise order.

55. Every objection intended to be made to the title of a defendant on an information in the nature of a *quo warranto* shall be specified in the order to shew cause or notice of motion; and no objection not so specified shall be raised by the relator on the pleadings without the special leave of the Court or a judge.

56. The Court may discharge an order *nisi* for an information in the nature of a *quo warranto* with or without costs, and in its discretion may, upon such notice as may be just, direct the costs to be paid by the solicitor or other parties joining in the affidavits in support of the application, although he be not the proposed relator.

57. A new relator may by leave of the Court, on notice of motion, be substituted for the one who first enters into the recognizance, on special circumstances being shewn.

58. Where several orders *nisi* for informations in the nature of *quo warranto* have been granted against several persons for usurpation of the same offices, and all upon the same grounds of objection, the Court may order such orders to be consolidated, and only one information to be filed in respect of all of them; or may order all proceedings to be stayed upon all but one, until judg- [★ 573] ment be given in that one; ★ provided always that no order be made to consolidate or stay any proceedings against any defendant unless he give an undertaking to disclaim, if judgment be given for the Crown, upon the information which proceeds.

59. If a defendant on an information in the nature of a *quo warranto* does not intend to defend, he may to prevent judgment by default enter a disclaimer at the Crown Office Department and file a copy there, and deliver another copy to the relator or his

solicitor. Upon the disclaimer being filed judgment of ouster may be entered at the Crown Office Department, and the costs taxed as in judgment by default.

MANDAMUS.

60. Application for a prerogative writ of mandamus shall, during the sittings, be made to a Divisional Court of the Queen's Bench Division by motion for an order *nisi;* and in the vacation to a judge in chambers for a summons to shew cause, upon its being shewn to the satisfaction of such judge that the matter is urgent. Provided that this rule shall not apply to any application for a writ of mandamus under 45 & 46 Vict. c. 50, s. 225.

61. Notice shall be given by the order *nisi* for a mandamus to every person who, by the affidavits on which the order is moved, shall appear to be interested in or likely to be affected by the proceedings, and to any person who in the opinion of the Court or judge ought to have such notice.

62. The order *nisi* shall be served upon each person to whom notice is given by the order, as well as the party whom the order requires to shew cause.

63. Any person, whether he has had notice or not, who can make it appear to the Court or judge that he is affected by the proceeding for a writ of mandamus, may shew cause against the order *nisi* or summons, and shall be liable to costs in the discretion of the Court or a judge if the order should be made absolute, or the prosecutor obtain judgment.

64. The order absolute for a mandamus need not be served, but the cost of service of the order absolute may be allowed in the discretion of the taxing officer, where the writ is not issued.

65. If the writ of mandamus is directed to one person only the original must be personally served upon such person, but if the writ be directed to more than one, the original shall be shewn to each one at the time of service, and a copy served on all but one, and the original delivered to such one.

66. When a writ of mandamus is directed to companies, corporations, ★justices, or public bodies, service shall be [★574] made upon such and so many persons as are competent to do the act required to be done, the original being delivered to one of such persons, except where by statute service on the clerk or some other officer is made sufficient service.

67. The Court or a judge may, if they or he shall think fit, order that any writ of mandamus shall be peremptory in the first instance.

68. Every writ of mandamus shall bear date on the day when it is issued, and shall be tested in the name of the Lord Chief Justice of England. The writ may be made returnable forthwith, or time may be allowed to return it, either with or without terms, as the Court thinks fit. A writ of mandamus shall be in the Form in the Appendix No. 37, with such variations as circumstances may require.

69. Any person by law compellable to make any return to a writ of mandamus shall make his return to the first writ.

70. Where a point of law is raised in answer to a return or any other pleading in mandamus, and there is no issue of fact to be decided, the Court, shall, on the argument of the point of law, give judgment for the successful party, without any motion for judgment being made or required.

71. Where under Rules 70 and 136 the applicant obtains judgment he shall be entitled forthwith to a peremptory writ of mandamus to enforce the command contained in the original writ, and the judgment shall direct that a peremptory writ do issue.

72. No action or proceeding shall be commenced or prosecuted against any person in respect of anything done in obedience to a writ of mandamus issued by the Supreme Court or any judge thereof.

73. When it appears to the Court that the respondent claims no right or interest in the subject matter of the application, or that his functions are merely ministerial, the return to the writ, and all subsequent proceedings down to judgment shall still be made and proceed in the name of the person to whom the writ is directed, and, if the Court thinks fit so to order, may be expressed to be made on behalf of the persons really interested therein. In that case the persons interested shall be permitted to frame the return and conduct the subsequent proceedings at their own expense; and if judgment is given for or against the applicant it shall likewise be given for or against the persons on whose behalf the return is expressed to be made; and if judgment is given for them, they shall have the same remedies for enforcing it as the person to whom the writ is directed would have in other cases.

74. Where, under the last preceding rule, the return to a writ of mandamus is expressed to be made on behalf of some person [★ 575] other ★ than the person to whom the writ is directed, the proceedings on the writ shall not abate by reason of the death, resignation, or removal from office of that person, but they may be continued and carried on in his name; and if a peremptory writ is awarded, it shall be directed to the successor in office or right of that person.

75. In any case of mandamus, in which a proceeding by way of interpleader may be proper, the provisions of Order LVII. of the Rules of the Supreme Court, 1883 (Interpleader), shall be applicable, so far as the nature of the case will admit.

76. No order for the issuing of any writ of mandamus shall be granted, unless at the time of moving an affidavit be produced by which some person shall depose upon oath that such motion is made at his instance as prosecutor; and if the writ be granted the name of such person shall be endorsed on the writ as the person at whose instance it is granted.

77. Every application for the costs of a mandamus shall, unless the Court or a judge shall otherwise order, be made before the fifth day of the sittings next after that in which the right to make such application accrued, and shall be upon notice of motion to be served eight days before the day named therein for moving.

78. The party moving for costs shall leave at the Crown Office Department a notice for the production in Court of all the affidavits filed in support of, and in opposition to, the original order.

79. Every application for a writ of mandamus to justices to enter continuances and hear an appeal shall be made within two calendar months after the first day of the sessions at which the refusal to hear took place, unless further time be allowed by the Court or a judge, or unless special circumstances appear by affidavit to account for the delay to the satisfaction of the Court.

ORDERS IN THE NATURE OF MANDAMUS.

80. An application for an order in the nature of a mandamus, to justices, or to a county court judge, or to justices to state and sign a case, shall be by motion for an order *nisi* (in the same manner as is provided in Rule 60).

PROHIBITION.

81. An application for a writ of prohibition on the Crown side shall be made by motion to a Divisional Court for an order *nisi* in all criminal causes or matters; and in civil proceedings on the Crown ★ side by motion for an order *nisi* or by sum- [★ 576] mons before a judge at chambers.

82. The order may be made absolute *ex parte* in the first instance on special circumstances being shewn, in the discretion of the Court or judge.

APPEARANCE TO INDICTMENT, INFORMATION, AND INQUISITION.

83. A defendant to any indictment, information, or inquisition in the Queen's Bench Division, or removed into the said division by writ of certiorari or otherwise, must enter or cause to be entered in a book at the Crown Office an appearance to such indictment, information, or inquisition; except that in treason or felony the defendant must appear in person in open court unless the Court or a judge shall order that the defendant be at liberty to appear and plead by solicitor, in which case the appearance may be entered as above stated.

84. If an indictment has been removed at the instance of the defendant, the prosecutor may draw up an order at the Crown Office to be served upon such defendant or his solicitor to appear, plead, and try according to the conditions of the recognizances entered into on removing such indictment.

85. In case such defendant shall not so appear, plead, and try, application may be made to the Court to estreat the recognizances so entered into, and for a writ of *procedendo* to carry back the indictment to the Court from whence it came; or if such writ of *procedendo* be not applied for, the Court or a judge, upon a certificate of one of the officers of the Crown Office of such default, may issue a warrant as provided in Rule 87. The certificate may be in the Form No. 40, or to the like effect.

86. As against any defendant to any indictment, information, or coroner's inquisition, other than a defendant at whose instance a writ of certiorari may have been awarded to remove such indictment or inquisition, the prosecutor may obtain a certificate from one of the officers of the Crown Office of an indictment, information, or coroner's inquisition having been filed. The certificate may be in the Form No. 41 or 42, or to the like effect.

87. Upon production of such certificate to a judge, such judge may, if necessary, issue a warrant under his hand to apprehend the defendant and cause him to be brought before him or some other judge or before a justice of the peace to be dealt with according to law. The warrant may be in Form No. 43 or 44, or to the like effect.

88. If it be proved upon oath before such judge or justice of the peace that the person apprehended and brought before him is the person charged and named in such indictment, informa- [★ 577] tion, or ★ inquisition, such judge or justice of the peace shall without further inquiry or examination commit him to prison by a warrant, which may be in the Form No. 45 or to the like effect, or admit him to bail.

Provided that nothing in these rules shall effect the jurisdiction of a judge to admit any defendant to bail whether in felony or misdemeanor, at any time after committal and before conviction, if he shall in his discretion so think fit.

89. When an indictment has been removed into the Queen's Bench Division, and the defendant has previously been held to bail in the court below, the judge shall not issue his warrant under the last preceding rule unless special circumstances be shewn upon affidavit, such as it being known to be his intention to abscond.

90. When any information is filed and the defendant is under terms to appear immediately and does not enter an appearance, the prosecutor may serve a notice upon the defendant to appear within five days, and in default of appearance may move the Court ex parte for leave to enter an appearance for him, or if the notice was personally served for an attachment.

91. If the defendant on any indictment or inquisition for misdemeanor, or information, wishes to avoid arrest upon a warrant, he may give twenty-four hours' notice of bail to the prosecutor, and enter into a recognizance before a judge or justice of the peace with sufficient surety or sureties to appear and answer the indictment, inquisition, or information, and personally appear at the trial, and on the return of the postea if it be necessary, and so from day to day and not depart without leave of the Court.

92. If the defendant be taken on a warrant he shall give twenty-four hours' notice of bail, and enter into a recognizance as in the last preceding rule mentioned before he can be discharged.

93. If any defendant to an indictment or inquisition for misdemeanor, or information, shall be detained in any prison for want of bail, the prosecutor of any such indictment, inquisition, or information, may cause a copy thereof to be delivered to the gaoler of the prison for such defendant, with a notice endorsed thereon that if the defendant do not within eight days after such delivery cause an appearance and a plea or demurrer to be entered to such indictment, inquisition, or information, an appearance and plea of not guilty will be entered for him; and if the defendant do not enter such appearance and plea or demurrer within eight days from the delivery of such copy of the indictment, inquisition, or information and notice, the prosecutor, upon filing an affidavit of the delivery of such copy and notice endorsed thereon to the keeper or gaoler as aforesaid, may cause an appearance and plea of not guilty to be entered to the indictment, inquisition, or information for the defendant; and proceedings [★ 578] ★shall be had thereon as if the defendant himself had duly appeared and entered such plea.

94. When any indictment has been found in, or removed into the Queen's Bench Division at the instance of the prosecutor, or of one or more of several defendants, the prosecutor may, instead of applying for a warrant under Rules 85, 86, 87, issue a writ of *venire facias* against such defendants as are not parties to the removal of the indictment, or defendants under recognizance to answer; or in the case of an information may issue either a sub-

pœna to answer, or a *venire facias* if it is intended to proceed to outlawry.

95. If the defendant does not appear within four days after the day named in the subpœna to answer, the prosecutor, upon filing an affidavit of due service of the subpœna to answer, may issue a writ of attachment.

96. If a defendant fails to appear within four days after the sheriff has returned to the court on the *venire facias* that he has summoned the defendant, the prosecutor may issue a writ of *distringas*.

97. If a defendant fails to appear within four days after the sheriff has returned to the court that he has distrained the lands and chattels of the defendant, the prosecutor may issue a writ of *capias ad respondendum*, and if necessary further proceed to outlawry as hereinafter provided by these rules; provided always that in felony, if the defendant has not been admitted to bail, the prosecutor may issue a writ of *capias* in the first instance.

98. The process against a body corporate, or inhabitants of a county, borough, parish, or place, to compel an appearance shall be by writs of *venire facias* and *distringas*. If such defendants do not appear within four day's after the sheriff has returned that he has distrained the defendants' land and chattels, alias and pluries writs of *distringas* may be issued with such increased amounts upon each succeeding writ as the Court or a judge may order.

OUTLAWRY.

99. To proceed to outlawry before judgment on an indictment for misdemeanor, or an information, the prosecutor must issue a writ of *venire facias* at the Crown Office returnable on a day certain either in or out of the sittings.

100. On the return of the sheriff that he has summoned the defendant, and the defendant has not appeared, the prosecutor may issue a *distringas* to answer, returnable on a day certain either in or out of the sittings, and if necessary alias writs of *distringas;* and if the sheriff ★return that the defendant [★ 579] has no goods in his bailiwick whereby he can be summoned, or distrained, a *capias ad respondendum*, tested and made returnable as the writ of *venire facias*, may be issued on the fourth day after the return.

101. On the return of *non est inventus* to a *capias ad respondendum*, before the prosecutor can proceed further he shall issue a second writ of *capias* on the fourth day after the return to the first, made returnable as the first writ, and shall issue a third writ of *capias* on the fourth day after the return of the second, tested and made returnable as the second writ.

102. If the defendant is dwelling in another county than where the indictment was found, or where the information be (*sic*) laid, the prosecutor shall issue another second writ of *capias cum proclamatione* to the sheriff of the foreign county after the return of the first writ to the sheriff of the county in which the indictment was found, or information laid, tested as the other writs of *capias*, but not to be made returnable till such a day certain as will enable the sheriff of the foreign county, if he cannot be found, to make proclamation at two of his county courts either three months, or four months, after the issue of the writ; according as the sheriff may hold his courts from month to month, or six weeks to six weeks.

103. Upon a return of *non est inventus* to the third writ of *capias* in the same county, and if the defendant be dwelling in another county to the *capias* to the sheriff of such county, a writ of exigent must be issued by the prosecutor.

104. Simultaneously with the writ of exigent a writ of proclamations shall be issued to the sheriff of the county where the defendant is mentioned to be, or inhabit; both writs must be tested on the day of the return to the previous process, and returnable on such day certain during the sittings, as will admit of their being delivered to the sheriff three months before return.

105. If it does not appear by the return of the writ of exigent that the defendant has been exacted five times and outlawed, the prosecutor must issue another writ of exigent with allocatur, commanding the sheriff to cause him to be further exacted until he shall have been exacted five times and outlawed.

106. Upon the return of the sheriff that the defendant has been exacted five times and outlawed, on application of the prosecutor judgment may be entered at the Crown Office.

107. After judgment has been entered, the roll of all the proceedings may be engrossed by the prosecutor, and filed at the Crown Office.

108. A writ of *capias utlagatum* may be issued by the prosecutor at any time the defendant is likely to be found, or a like writ [★ 580] ★ special, *cum breve de inquirendo;* or if necessary a writ of *melius inquirendum* may be applied for.

109. All the rules as to proceeding to outlawry on indictment in misdemeanor before judgment, shall apply to indictment for felony; except that in felony the prosecutor may issue a writ of *capias ad respondendum* at once, instead of a *venire facias* to answer.

110. On proceeding to outlawry after judgment on indictment, for felony or misdemeanor or information, the prosecutor may issue a writ of *capias ad satisfaciendum* into the county where the indictment is found, or information laid, returnable on the first day of the then next sittings One writ of *capias* only need be issued; and on return of *non est inventus*, the prosecutor may issue a writ of exigent tested on the return day of the writ of *capias*, returnable on the first day of the then next sittings. It shall not be necessary to issue any writ of proclamations on the return of a writ of *capias ad satisfaciendum*.

111. After the return to the writ of exigent, the rules as to proceeding after writ of exigent in outlawry before judgment shall apply to proceedings in outlawry after judument.

112. In the county of Lancaster the *capias utlagatum* and all subsequent process shall be directed to the Chancellor of the Duchy.

REVERSAL OF OUTLAWRY.

113. It shall not be necessary for any person who shall be outlawed before conviction for any matter or thing except treason or felony to appear in person to reverse such outlawry, but such person may appear by solicitor and reverse the same.

114. If any person outlawed otherwise than for treason, or felony, before conviction be taken and arrested upon any *capias utlagatum*, the sheriff may take a solicitor's engagement under his hand to appear for the defendant, and shall thereupon discharge the defendant from the arrest.

115. If a defendant surrenders or is taken before outlawry is complete on misdemeanor before judgment, he may give bail in such amount, and with or without sureties, as a judge may direct, to appear to the indictment, inquisition, or information, and on appearance apply to the court or a judge for a *surpesedeas* to the process of outlawry.

116. If a defendant comes in on an indictment or information for misdemeanor, and reverses the outlawry before judgment, he shall plead instanter.

117. On an indictment or inquisition for felony, or in any case after judgment, a defendant who surrenders or is taken before the ★ outlawry is complete, shall be committed to answer the [★ 581] indictment or inquisition or to satisfy the judgment, but may supersede the outlawry process.

118. To reverse outlawry after conviction the defendant shall surrender himself into custody, and afterwards be brought into court to assign errors upon the judgment in outlawry, by *habeas corpus*.

119. If the defendant be taken on a *capias utlagatum*, he shall deliver the writ of error into court when he appears upon the return to the *capias:* he shall then move for an order to bring him up again to assign errors, and shall be committed by the Court to the Queen's Prison.

120. Until outlawry be reversed a defendant after conviction shall not be committed, or called up for judgment upon an indictment, information, or inquisition.

121. Upon the assignment of error in outlawry the prosecutor shall join in error within eight days, and the case may then be entered in the Crown paper for argument on the application of either party, as in error to the Queen's Bench Division from inferior courts.

BAIL.

122. Applications for bail in felony or misdemeanor, where the party is in custody, shall be in the first instance by summons before a judge at chambers for writ of *habeas corpus*, or to shew cause why the defendant should not be admitted to bail either before a judge at chambers or before a justice of the peace, in such an amount as the judge may direct.

RECOGNIZANCES.

123. Every recognizance acknowledged on the removal of an indictment, order, or other proceeding, or to prosecute any information granted by the Queen's Bench Division, or for the appearing or answering of any party in the said Division, or for good behaviour, or for any other purpose, shall, after the acknowledgment thereof, be transmitted to the Crown Office and filed there.

124. No recognizance shall henceforth be forfeited, estreated, or put upon the estreat roll without the order of the Court or a judge, nor unless an order or notice shall have been previously served upon the parties by whom such recognizances shall have been given, calling upon them to perform the conditions thereof; and no default shall be considered to be made in performing the conditions of a recognizance by reason of the trial of any indict-

[★ 582] ment or presentment or the argument ★ of any order or conviction or other proceeding having stood over, where such indictment has been made a remanet, or such indictment or order has stood over by order of the Court, or by consent in writing of the parties.

125. Every recognizance to appear and answer to any indictment found in the Queen's Bench Division or removed into the same, or to any ex-officio or criminal information, shall, unless the Court or a judge shall by order dispense therewith, contain, besides any other condition which may be imposed, a condition that the defendant shall personally appear from day to day on the trial of such indictment or information, and not depart until he shall be discharged by the Court before whom such trial shall be had.

126. Whenever it has been made to appear to the Court or a judge that a party has made default in performing the conditions of any recognizance, into which he has entered, filed in the Crown Office, the Court or a judge, upon notice to the defendant and his sureties, if any, may order such recognizance to be estreated into the Exchequer without issuing any writ of *scire facias*.

SCIRE FACIAS.

127. No proceedings shall be taken in the Crown Office by *scire facias* upon recognizance.

PLEADINGS.

(A.)—*Pleadings on Indictment, Information, or Inquisition.*

128. Every pleading other than a plea of guilty or not guilty to an indictment, information, or inquisition shall be intituled: "In the High Court of Justice, Queen's Bench Division," and shall be dated of the day of the month and the year when the same was pleaded, and shall bear no other time or date. It shall be written or printed on paper, and a copy shall be delivered to the opposite party and be filed at the Crown Office.

129. All the proceedings shall be entered on the record made up for trial, and on the judgment roll, under the date of the month and year when the same respectively took place, and without reference to any other time or date, unless otherwise specially ordered by the Court or a judge.

130. Every special plea or demurrer shall be in writing and if settled by counsel signed by him, and if not so settled shall be signed by the solicitor or the party if he defends in person.

[★ 583] ★ 131. One order only to plead, reply, rejoin, join in demurrer or in error, or plead subsequent pleadings in all prosecutions by way of indictment, inquisition, or information shall be given, and such order may be drawn up and served as well during the sittings as in vacation; and every such order shall expire as follows, that is to say, every order to plead, in ten days next after service thereof, unless the time be extended by order of the Court or a judge, and every order to reply rejoin, join in demurrer, or in error, or plead subsequent pleadings, in eight days next after service thereof, unless the time be extended as aforesaid.

132. In indictments for felony or treason the defendant shall

plead in open court in the Queen's Bench Division, unless he has obtained a judge's order upon special circumstances, for liberty to appear and plead by solicitor in the Crown Office. On the appearance of a defendant to any indictment, inquisition, or information, an order to plead may be drawn up at the Crown Office by the prosecutor or his solicitor.

133. Time in which to plead may be extended on application by summons to a Judge at Chambers, upon such terms and for such time, as the judge in his discretion may think fit.

(B.)—*Pleadings in Quo Warranto.*

134. When any information in the nature of a *quo warranto* has been filed, the defendant may plead to such information within such time, and in like manner as if the information were a statement of claim delivered in an action; and, subject to these rules, this pleading and all subsequent proceedings, including pleadings, trial, judgment, and execution, shall proceed and may be had and taken as if in an action; and where the judgment is for the relator judgment of ouster may be entered for him in all cases.

135. The prosecutor in answer to a plea that the defendant has held and executed the office or franchise for six years before the exhibiting the information may reply any forfeiture, surrender, or avoidance by the defendant within the said six years.

(C.)—*Pleadings in mandamus.*

136. When any return is made to the first writ of mandamus, the applicant may plead to the return within such time and in like manner as if the return were a statement of defence delivered in an action; and, subject to these rules, this pleading and all subsequent proceedings, including pleadings, trial, judgment, and execution, shall proceed and may be had and taken as if in an action.

★ (D.)—*Pleadings in Prohibition.* [★584]

137. Where pleadings in prohibition are ordered the pleadings and subsequent proceedings, including judgment and assessment of damages, if any, shall be, as nearly as may be, the same as in an ordinary action for damages.

COPIES OF PROCEEDINGS AND SERVICE.

138. Copies of all informations, indictments, or presentments, and of all pleadings thereupon, and of mandamus and return and traverse or other pleadings thereupon, and of convictions, orders, and every other proceeding filed in the Crown Office shall, when required, be made at the Crown Office and delivered to the respective parties or other parties requiring the same on payment of the proper charges.

139. Whenever under these rules service of any writ, notice, pleading, order, summons, warrant or other document, proceeding, or written communication, is not directed to be personal, service at the last known place of abode, or business, with a

clerk, wife, or servant, or upon such other person, or in such other manner as the Court or a judge may direct, shall be deemed to be a sufficient service.

SPECIAL CASES AND DEMURRERS.

140. Order XXXIV. of the Rules of the Supreme Court, 1883 (special case), shall as far as it is applicable, apply to all civil proceedings on the Crown side.

The following rules shall apply to all criminal proceedings on the Crown side :—

141. Demurrers and special cases shall be entered at the Crown Office for hearing at the request of either party, without any order for a concilium, eight clear days before the day on which they are set down for argument, and notice thereof shall be given forthwith to the opposite party.

142. Every special case shall be divided into paragraphs, which as nearly as may be shall be confined to a distinct portion of the subject, and every paragraph shall be numbered consecutively. the taxing officer shall not allow the costs of drawing and copying any special case not substantially complying with this rule without the special order of the Court.

[★585] ★ PAPER BOOKS.

143. In all cases entered for argument in the Crown Paper, where paper books are required, the party or solicitor entering shall, two days before the day appointed for argument, deliver two paper books of the proceedings for the use of the judges at the Crown Office.

144. Such paper books shall be marked "for the use of the judges in the Queen's Bench Division," and not with the name of any particular judge.

145. Such paper books shall contain, where the party is seeking to quash any order or conviction, together with the copies of the proceedings, a copy of the order *nisi* to quash.

146. If paper books are not delivered the other party may, on the day following, deliver such copies as ought to have been so delivered by the party making default; and the party making default shall not be heard until he shall have paid for such copies, or deposited at the Crown Office a sufficient sum to pay for the same. In default of both parties the case shall be struck out, unless otherwise ordered.

147. On the argument of any case entered in the Crown Paper, where the Court has granted an order *nisi*, the counsel for the parties shewing cause shall begin; but on an order *nisi* to quash an order or conviction, and in every other case the counsel for the appellant or party desirous of displacing the *status quo* shall begin.

NOTICE OF TRIAL.

148. Notice of trial shall state the place at which the trial is to be had, and the day on or after which the record is to be tried.

149. If the prosecutor or relator does not, within six weeks after issue joined, or within such extended time as the Court or

a judge may allow, give notice of trial, the defendant may give such notice, and when the defendant is bound by recognizance to give notice of trial the prosecutor may, in all cases, give notice by proviso.

150. Ten days' notice of trial shall be given in all cases, unless a longer notice shall be ordered by the Court or a judge, or the party to whom it is given shall consent to take short notice of trial, which shall be understood to mean four days' notice or any longer period.

151. Notice of trial shall be given before entering the record for trial.

152. Notice of trial for London or Middlesex shall not be, or operate as for, any particular sittings, but shall be deemed to be for the day ★ stated in the notice, or for any day after [★ 586] the expiration of the notice, on which the record may come on for trial.

153. Notice of trial elsewhere than in London or Middlesex shall be deemed to be for the first day of the then next assizes, at the place for which notice of trial is given.

154. No notice of trial shall be countermanded, and no record withdrawn except by leave of the Court or a judge, which leave may be given subject to such terms as to costs or otherwise as may be just.

CONTINUANCES.

155. No continuance by way of imparlance, *curia advisari vult*, *vicecomes non misit breve*, or otherwise, shall be necessary, nor shall any entry thereof be made, upon any record, or roll whatever, or in the pleadings.

ENTERING RECORD FOR TRIAL.

156. If the prosecutor or relator, after having given notice of trial for London or Middlesex, does not enter the record within six days, the party to whom notice may have been given shall be at liberty to enter it with the leave of the Court or a judge.

157. No warrant of *nisi prius* from the Attorney-General for making up a record shall hereafter be necessary.

JURY.

158. Writs of *venire facias*, or other writs for the summoning of juries, shall no longer be used, but the jury, whether special or common, shall be taken from the list of persons summoned for the sittings or assizes, and a panel shall be annexed to the record as in civil cases. Either the prosecutor or the defendant may, except in case of felony, obtain a special jury upon giving the like notice as is required in civil cases, and the Court or a judge may, at the instance of either party, order that a special jury be struck as provided for by "The Juries Act, 1870." And when the jury has been reduced either party may draw up an order at the Crown Office directing the sheriff to summon that particular jury at such time and place as may be required.

VIEW.

159. Upon any application for a view there shall be an affidavit stating the place at which the view is to be made, and the [★ 587] distance ★ thereof from the office of the under sheriff; and the sum to be deposited with the under sheriff shall be £10 in case of a common jury, and £16 in case of a special jury, if such distance do not exceed five miles, and £15 in case of a common jury, and £21 in case of a special jury, if it be above five miles. And if such sum shall be more than sufficient to pay the expenses of the view, the surplus shall forthwith be returned to the solicitor of the party who obtained the view. If such sum shall not be sufficient to pay such expenses the deficiency shall forthwith be paid by such solicitor to the under sheriff, and the under sheriff shall pay and account for the money so deposited, according to the scale at the end of the Appendix to these Rules.

TRIAL AT BAR.

160. A trial at bar shall not be had except by order of the Court.

161. An application for a trial at bar shall be by motion for an order *nisi* except when made by the Attorney-General on behalf of the Crown, when the order shall be absolute in first instance as of course.

162. On making the order absolute for a trial at bar the Court may impose such terms on the applicant as to payment of costs, or otherwise, as the Court may think fit.

163. The Court may direct the jury to be summoned from the county in which the offence was committed or from any other county not exempt by law, at any time after joindure of issue. The order for the jury shall be lodged with the sheriff of such county in sufficient time for the jury to be summoned six days before the trial.

164. Three copies of the roll upon which the trial is to take place shall be delivered by the applicant for the trial at bar at the Crown Office, for the use of the judges, four days before the day fixed for the trial.

165. A trial at bar may be continued, *de die in diem*, or adjourned to a subsequent day at any time, in the discretion of the Court, without any reference to the sittings of the High Court; and no formal order shall be drawn up for any such continued sitting or adjournment, nor shall any such order be entered on the roll.

NEW TRIAL.

166. Applications for a new trial, or to enter judgment *non obstante veredicto*, or to arrest judgment, where such applications may by law be made, shall be by motion for an order *nisi*. Such [★ 588] motion shall be ★ made to a Divisional Court of the Queen's Bench Division; and in cases tried in London or Middlesex within eight days after the trial, or on the first subsequent day on which a Divisional Court shall sit to hear motions on the Crown side, or if the trial has been had at the assizes, within the first seven days after the last day of the sittings on the cir-

cuits for England and Wales: the time of the vacations shall not be reckoned in the computation of time for moving.

167. The time in either case may be extended by the Court or a judge. The grounds upon which the order was granted shall be stated in the order.

168. A copy of such order shall be served on the opposite party within four days from the time of the same being granted.

169. On moving for a new trial on indictment, information, or inquisition, all the defendants, if more than one, who are not either in custody or who are only liable to a fine, must be present in Court, unless the Court shall otherwise order.

JUDGMENT BY DEFAULT.

170. In case no plea, replication, rejoinder, joinder in demurrer, or other pleading (except joinder in error by the prosecutor) shall be entered within the time limited, judgment as for want of such pleading may be entered at the opening of the office on the next following morning after the expiration of the time limited, upon filing an affidavit of service of the order to plead, reply, &c., as the case may be, unless an order of the Court or a judge extending such time shall have been obtained and served, in which case judgment shall not be signed until the day after the expiration of the time granted by such order.

JUDGMENT.

171. Upon every trial, whether at the assizes or at the sittings in London or Middlesex, the associate, clerk of assize, or master shall enter in a book to be kept for that purpose,—1st, the verdict of the jury and all such findings of fact, if any, as the judge may direct to be entered; 2nd, the directions, if any, of the judge as to judgment; 3rd, the certificates, if any, granted by the judge: and the sentence of the judge if then passed. A certificate, signed by the associate, of such verdict, finding, or direction, judgment, or sentence shall be filed at the Crown Office by the associate; and judgment upon the *postea* may be entered at the Crown Office at any time after the expiration of the time limited for applying for a new trial, or for ★ en- [★ 589] tering judgment *non obstante veredicto*, or arresting judgment unless otherwise ordered.

172. On all trials for felonies or misdemeanors in the Queen's Bench Division, except upon informations filed by leave of the Court and *ex officio* informations where the Attorney-General shall pray that the judgment may be postponed, judgment may be pronounced during the sittings or assizes at which the trial has taken place by the judge before whom the verdict has been taken, as well upon the defendant who shall have suffered judgment by default or confession as upon those who shall have been tried and convicted, and whether such persons be present or not in court.

173. The judge before whom the trial shall be had may either issue an immediate order or warrant for committing the defendant in execution, or respite the execution of the judgment on such terms, as he shall think fit, and for such time as may be necessary, for the purpose of enabling the defendant to move for a new trial, or in arrest of judgment; and, if imprisonment be part of the sentence, may order the period of imprisonment to commence

on the day on which the party shall be actually taken to and confined in prison.

174. If a defendant be convicted and not sentenced at the trial, and is not under recognizance or under sufficient recognizance to appear to receive the sentence of the Court, or if it be made to appear on affidavit or otherwise that he is likely to abscond, a judge's warrant may be obtained at any time after verdict and before final judgment, and either from the judge at the trial or from a judge at chambers, to hold him to bail, or to require him to give such further bail as the judge in his discretion may think fit, upon a certificate, if he be not under recognizance, of the conviction to be obtained from the clerk of assize or associate, and a certificate of his not being under recognizance from the Crown Office; or if he be under recognizance, upon a certificate of conviction and an affidavit of facts shewing the necessity of further bail.

175. The *postea* may be obtained by the party in whose favour the verdict was found from the associate, clerk of assize, or master on the day after the last day on which a motion may be made for a new trial, or in arrest of judgment, or for judgment *non obstante veredicto*, unless there be an order *nisi* granted; and, if an order *nisi* has been granted, at any time after such order *nisi* shall have been discharged; and shall be produced at the Crown Office, where the judgment will be entered in a book and signed on the record, according to the verdict, by the Queen's coroner and attorney or the master of the Crown Office.

176. If judgment on the *postea* is for the Crown or the [★ 590] ★ prosecutor, and the defendant is not under recognizance to appear to receive sentence, he may be served with a four days' notice to appear on a certain day to receive the sentence of the Court; or the prosecutor may issue a writ of *capais ad satisfaciendum* to take the defendant, to remain in custody without bail or mainprize until he satisfies the judgment or obtains his discharge upon writ of error.

177. If the defendant be not in custody and be under recognizance to appear to receive sentence, the defendant and his bail may be served with a four days' notice that, on a day named therein, the Court will be moved for judgment. Such service need not be personal.

178. The *postea*, or if interlocutory judgment be upon confession, default, or retraxit, the entry roll, shall be in Court on moving for final judgment; and if the defendant does not answer on being called three times the prosecutor, on an affidavit of service of notice, may move under Rule 126 to estreat the recognizance; and upon the estreat of the recognizance a judge may grant a bench warrant for the apprehension of the defendant; or the prosecutor may issue a *capias* and proceed to outlawry.

179. The Court on giving final judgment or the Court of Appeal on affirmance may, if they shall so think fit, on the application of the defendant then present, respite the execution of the judgment for such time as may be necessary for the defendant to obtain the Attorney-General's fiat for a writ of error, or consent for an appeal to the House of Lords upon the defendant entering into a recognizance with two sufficient sureties, upon such terms as the Court may order, to render himself into custody or to prosecute his writ of error or appeal with effect; and may order the period of imprisonment, if that be part of the sentence, to commence on the day on which the party shall be actually taken to and confined in prison.

180. When any defendant shall, after verdict, be brought up

for sentence on any indictment or information, after the notes of the trial shall have been read, the affidavits produced on the part of the defendant, if any, shall be read, and then any affidavits produced on the part of the prosecution; after which the counsel for the defendant shall be heard, and lastly, the counsel for the prosecution.

181. When any defendant shall be brought up for sentence after judgment, by default, confession or retraxit, the prosecutor's affidavits shall be first read, then the defendant's affidavits; after which the counsel for the prosecution shall be heard, and lastly the counsel for the defendant.

182. If no affidavits are produced the counsel for the defendant shall be first heard and then the counsel for the prosecutor.

★ ERROR. [★ 591]

183. Error upon a judgment shall lie to the Queen's Bench Division.

184. No writ of error shall lie without the fiat of the Attorney-General having been first obtained.

185. The writ of error upon judgment given in inferior courts, with the return thereto, shall be filed at the Crown Office.

186. Rule 179 shall apply to all judgments upon writs of error.

187. The plaintiff in error shall assign errors in person or by his solicitor, and, if in person and in custody, shall be brought up into court for that purpose upon a writ of *habeas corpus*.

188. If the plaintiff in error assigns errors by his solicitor or in person and is not in custody, he may do so by delivering the assignment of errors in writing to be filed at the Crown Office.

189. If the plaintiff in error assigns errors in person and is in custody he shall be brought into court, and assign errors, and move that counsel may be assigned to him, and shall then deliver to the officer of the court in writing the assignment of errors to be filed at the Crown Office.

190. Upon delivery of the assignment of errors under the last preceding Rule an order of Court shall be drawn up to commit the plaintiff in error to the Queen's Prison, until the decision of the Court upon the writ.

191. In misdemeanor the plaintiff in error need not assign errors in person, or have counsel assigned to him or, if in custody, be present at the hearing of the case or when judgment is given, unless the Court shall otherwise order.

192. An order for the Attorney-General or Queen's Coroner and Attorney to join in error within eight days after service may be drawn up at the Crown Office and be served, with a copy of the assignment of errors, on the prosecutor or his solicitor.

193. If no joinder be filed within eight days, the plaintiff in error being personally present in court, upon a certificate of notice having been given to the Attorney or Solicitor-General, signed by him, or on his behalf, of such intended application, may move the Court for an order *nisi* for judgment; and upon an affidavit of service of the order *nisi* upon the officer of the court from whence error is brought, the Court may examine the record and give judgment of reversal, or such judgment as the Court from which error is brought ought to have done.

194. If no joinder be filed within eight days, and the plaintiff in error be in custody, he may be brought into court by order if he be in the Queen's Prison, or by *habeas corpus* if elsewhere, and the plaintiff in error or his counsel may then move, on an affi-

[★ 592] davit of service of the ★ order to join in error, and that on search made at the Crown Office that it appears there is no joinder filed, for judgment for the plaintiff in error, and for the prisoner's discharge.

195. Joinder in error shall be filed at the Crown Office by the prosecutor, and a copy served on the plaintiff in error or his solicitor.

196. At any time after filing of the joinder in error the case may be put into the Crown paper for argument, upon the application of either party.

197. Two paper books for the use of the judges shall be delivered by the plaintiff in error at the Crown Office two days before the day appointed for hearing.

198. On judgment being given, an order, either for remanding the prisoners to undergo the remainder of their sentences, or for their discharge, shall be drawn up and lodged with the gaoler by the prosecutor.

199. Where a writ of error has been brought by the defendant and not by the Attorney-General, the defendant on the indictment on obtaining his writ of error, or consent for an appeal to the House of Lords shall have the execution of the judgment stayed, and receive back the amount of any fine levied upon him upon the judgment, and further if in custody shall be entitled to be discharged from imprisonment on entering into a recognizance with two sufficient sureties to prosecute the writ of error in the Form No. 127 before a judge of the High Court, or justice of the peace of the county, borough, or place where the defendant may be in custody. The bail to be justified in the usual manner, on twenty-four hours' notice to the prosecutor, or on such other notice as the judge, or justice of the peace, may order. Provided that in the case of any defendant under legal disability, it shall be sufficient if two persons to be appointed to be approved of by such judge or justice shall become bound by such recognizance on behalf of such defendant.

200. Every such recognizance shall be filed at the Crown Office, and the Queen's Coroner and Attorney, or the Master of the Crown Office, shall make out and deliver a certificate sealed with the seal of the office that such recognizance is duly filed of record, which certificate shall be a sufficient warrant to the gaoler having the custody of the plaintiff in error, to discharge him out of custody, and for the repayment of any fine which may have been imposed by the Court by the person having in his possession the whole or any part of the fine levied in execution of such judgment. Provided that no person who shall have received any such money and have paid it over to any other person according to the [★ 593] course of the Exchequer ★ shall be liable to repay to the defendant any part of the money so paid over.

201. If the plaintiff in error shall make default in prosecuting the writ of error with effect or in any other way break the conditions of his recognizance, the Court may estreat the recognizance in a summary way without issuing a writ of *scire facias*, and order the writ of error to be quashed without any argument thereon; and in every such case the plaintiff in error shall forthwith be liable to execution upon the judgment.

202. Whenever any writ of error shall be brought for the reversal of any judgment in misdemeanor and error shall be assigned thereon, no judgment of reversal shall be entered either for want of a joinder, or otherwise, without the Order of the Court in which such writ of error shall be pending, pronounced in open court, and upon a certificate, signed by or on behalf of the Attorney or Solicitor-General, that notice has been given to

one of them of such intended application; and if there be no joinder in error such Court may proceed to examine the record in error, and give such judgment thereon as the Court from which error is brought ought to have done, although no joinder in error may have been filed.

203. Whenever the judgment against the plaintiff in error shall have been for the payment of a fine, and imprisonment until such fine be paid, either with or without imprisonment for a certain time, and the plaintiff in error shall have paid the fine, or the same or any part thereof shall have been levied and shall have been received back under the provisions of Rules 199 and 200, and the judgment upon writ of error brought shall be affirmed, the plaintiff in error shall not be entitled, by reason of such payment as aforesaid, to be discharged from imprisonment, notwithstanding the expiration of any certain time of imprisonment for which the original judgment shall have been given until the fine shall be again paid.

204. When a recognizance on bail in error shall have been estreated, or judgment been affirmed, or writ of error been quashed, on an affidavit or a certificate of the proper officer of the Court to any such effect, and that default has been made for the space of four days in rendering the plaintiff in error to prison, a Judge at Chambers may issue his warrant to cause the defendant to be apprehended and imprisoned pursuant to and in execution of the judgment, on an ex parte application by the prosecutor.

205. Whenever a plaintiff in error shall be committed by the Court in execution of the judgment given against such plaintiff in error, and whenever a plaintiff in error shall, by virtue of any warrant or in other manner, be rendered to prison in execution of such judgment, ★ the imprisonment (if imprison- [★ 594] ment shall not have commenced under such execution) shall be reckoned to begin from the day when such plaintiff in error shall be in actual custody in the prison in which he may have been adjudged to be imprisoned under such judgment; and if the plaintiff in error shall have been discharged from imprisonment on giving bail in error, as is in these rules before mentioned, such plaintiff in error shall be imprisoned for such further period in the same prison as with the time during which such plaintiff in error may already have been imprisoned under such execution shall be equal to the period for which he was adjudged to be imprisoned as aforesaid.

206. Whenever default shall have been made in rendering a plaintiff in error to prison in execution of a judgment for misdemeanor, and a warrant shall have been issued against such plaintiff in error to enforce such render to prison, according to the provisions of these rules, such plaintiff in error shall be liable to pay the costs and charges of such render; and if the prosecutor shall, before the expiration of the plaintiff in error's imprisonment, have caused the amount of such costs and charges to be ascertained by one of the masters of the Crown Office, and shall have left with the said plaintiff in error, and with the keeper of the prison or his deputy, a certificate under the hand of such master, of the amount of such costs so ascertained, then the said plaintiff in error shall not be discharged out of custody until such costs and charges shall have been paid, or until an order for such discharge has been made by a Court exercising bankruptcy jurisdiction.

ERROR UPON JUDGMENTS IN THE QUEEN'S BENCH DIVISION.

207. Every writ of error from a judgment of the Queen's Bench Division of the High Court, shall be made returnable before the Court of Appeal, and served by delivery at the Crown Office.

208. Upon the delivery of the writ of error the prosecutor shall enter the proceedings up to judgment on the roll, and carry it into the Crown Office; and if the prosecutor does not, within a reasonable time, carry in the roll, the plaintiff in error may obtain a judge's order upon a summons to compel him to do so.

209. When the roll has been carried in, the plaintiff in error, on application to the Queen's Coroner and Attorney or the Master of the Crown Office, may obtain a memorandum or certificate of the allowance of the writ of error, for service upon the defendant in error or his solicitor.

210. The plaintiff in error, within twenty days after the allowance of the writ of error, shall make a transcript of the record on parchment, and lodge it at the Crown Office: and if the record be [★ 595] not ★ transcribed within such time, the defendant in error may move the Court of Appeal for leave to sign judgment of *non prosequitur* at the Crown Office.

211. When the transcript has been lodged it shall be annexed to the writ of error, and (on a return made and signed by the Lord Chief Justice of England) delivered into the Court of Appeal by the proper officer at the Crown Office.

212. The plaintiff in error shall, within eight days after delivery of the record into the Court of Appeal, assign errors thereon.

213. Upon filing of the joinder in error the case shall be put into the list of appeals for argument, upon application of either party.

214. The rules as to assigning errors and subsequent proceedings up to judgment in the Queen's Bench Division shall apply to the Court of Appeal.

215. Upon the judgment of the Court of Appeal being pronounced in favour of the plaintiff in error, the Court may either pronounce the proper judgment and order his discharge if in custody or remit the record to the Queen's Bench Division, to be dealt with according to law.

APPEALS.

216. Order LVIII. of the Rules of the Supreme Court, 1883 (Appeals), shall apply to all civil proceedings on the crown side, including Mandamus, Prohibition, and Quo Warranto.

EXECUTION.

217. Order XLII. of the Rules of the Supreme Court, 1883 (Execution), shall, as far as it is applicable, apply to all civil proceedings on the Crown side.

The following Rules shall apply to all criminal proceedings on the Crown side :—

218. A judgment or order requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by writ of attachment, or by committal.

219. No writ of execution shall be issued without the party issuing it or his solicitor filing a præcipe for that purpose. The

præcipe shall contain the title of the proceeding and the date of the judgment or order on which it is founded, the names of the parties against whom the execution is to be issued, and shall be signed by or on behalf of the solicitor of the party issuing it, or by the party issuing if he do so in person.

★ 220. Every writ of execution shall be endorsed [★ 596] with the name and place of abode, or office of business, of the solicitor actually suing out the same; and when the solicitor actually suing out the writ shall sue out the same as agent for another solicitor, the name and place of abode of such other solicitor shall be endorsed upon the writ; and in case no solicitor shall be employed to issue the writ, then it shall be endorsed with a memorandum expressing that the same has been sued out by the party in person, mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house of such residence, if any such there be.

221. Every writ of execution shall be made returnable immediately after the execution thereof.

222. In every case of execution the party entitled to execution may levy the poundage, fees, and expenses of execution over and above the sum recovered.

223. Every writ of execution for the recovery of money shall be endorsed with a direction, to the sheriff or other officer or person to whom the writ is directed, to levy the money really due and payable and sought to be recovered, with interest at the rate of £4 per cent. per annum from the time when the judgment was entered up or from the date of the order.

224. Every person to whom any sum of money or any costs shall be payable under a judgment shall, immediately after the time when the judgment was duly entered, be entitled to sue out one or more writ or writs of *fieri facias*, or one or more writs of *elegit* to enforce payment thereof.

225. Every order of the Court or a judge in any cause or matter may be enforced in the same manner as a judgment to that effect.

226. A writ of execution, if unexecuted, shall remain in force for one year only from its issue, unless renewed in the manner hereinafter provided; but such writ may, at any time before its expiration, by leave of the Court or a judge, be renewed by the party issuing it, for one year from the date of such renewal, and so on from time to time during the continuance of the renewed writ, either by being marked with a seal of the Court bearing the date of the day, month, and year of such renewal, or by such party giving a written notice of renewal to the sheriff, signed by the party or his solicitor, and bearing the like seal of the Court; and a writ of execution so renewed shall have effect and be entitled to priority according to the time of the original delivery thereof.

227. The production of a writ of execution or the notice renewing the same, purporting to be marked with such seal as in the last preceding rule mentioned, shewing the same to have been renewed, shall be sufficient evidence of its having been so renewed.

★ 228. Writs of *fieri facias* and of *elegit* shall have the [★ 597] same force and effect as the like writs have heretofore had, except that a writ of *elegit* shall no longer extend to the goods of the debtor, and shall be executed in the same manner in which the like writs have heretofore been executed.

WRITS.

229. All writs on the Crown side shall be issued at the Crown Office Department of the Central Office.

230. Every writ shall be prepared by the solicitor or party suing out the same, and shall be written or printed on parchment. Every writ shall, before being sealed, be endorsed with the name and address of such solicitor or party; and, if sued out by the solicitor as agent, with the name and address of the principal solicitor also. With the exception of writs of *subpœna ad testificandum*, all writs issued at the Crown Office shall be entered in a book to be there kept for the purpose.

231. Every writ, except as hereinafter by these rules provided, shall bear date on the day on which the same shall be issued, and shall be tested at the Royal Courts of Justice, London, in the name of the Lord Chief Justice of England.

232. Every writ, unless by these rules otherwise provided, issued by the Queen's Bench Division, when returnable in Court, shall be made returnable forthwith in such Division; and such of the aforesaid writs as may be made returnable at chambers, shall be made returnable forthwith before a judge at chambers, unless otherwise ordered; provided that every writ of *habeas corpus ad subjiciendum* shall be made returnable immediately.

233. Every order to return a writ shall require such return to be made within four days next after service of such order, if served in London or Middlesex, and within eight days in all other cases. Every writ returnable in Court shall, together with the return thereto, be filed in the Crown Office, and every writ returnable before a judge shall after the decision of the judge thereon, be so filed, with the return and any order made thereon, or a copy of such order; provided that any writ of *certiorari* to remove inquisitions and depositions taken before a justice of the peace, or a coroner, upon the commitment of any person charged with any offence, shall, as soon as the Court or a judge shall have exercised their or his discretion thereon, be transmitted to the clerk of assize or clerk of the peace, or other officer (as the case may be) of the county, borough, or place from which they have been received.

234. Every writ to compel an appearance shall require the ap- [★ 598] ★ pearance to be entered in the Crown Office on a day certain; and in case no appearance shall be entered at the end of four days, exclusive of the return thereof, further process may issue to compel an appearance, which further process shall be tested on the return day of the previous process; and every writ of *capias ad satisfaciendum* shall have eight days at least between such *teste* and return.

HABEAS CORPUS.

A.—*Ad subjiciendum.*

235. An application for a writ of *habeas corpus ad subjiciendum* may be made to the Court or a judge.

236. If made to the Court the application shall be by motion for an order, which, if the Court so direct, may be made absolute *ex parte*, for the writ to issue in the first instance; or if the Court so direct they may grant an order *nisi*.

237. If made to a judge he may order the writ to issue *ex parte* in the first instance or may direct a summons for the writ to issue.

238. Provided that no application for a writ of *habeas corpus* on a warrant of extradition shall be made to a judge at chambers, during the sittings.

239. The writ of *habeas corpus* shall be served personally, if possible, upon the party to whom it is directed; or if not possible, or if the writ be directed to a gaoler or other public official, by leaving it with a servant or agent of the person confining or restraining, at the place where the prisoner is confined or restrained, and if the writ be directed to more than one person, the original delivered to or left with such principal person, and copies served or left on each of the other persons in the same manner as the writ.

240. If a writ of *habeas corpus* be disobeyed by the person to whom it is directed, application may be made to the Court, on an affidavit of service and disobedience, for an attachment for contempt. In vacation an application may be made to a judge in chambers, for a warrant for the apprehension of the person in contempt to be brought before him, or some other judge, to be bound over to appear in court at the next ensuing sittings, to answer for his contempt, or to be committed to the Queen's prison for want of bail.

241. The return to the writ of *habeas corpus* shall contain a copy of all the causes of the prisoner's detainer endorsed on the writ, or on a separate schedule annexed to it.

242. The return may be amended or another substituted for it by leave of the Court or a judge.

243. When a return to the writ of *habeas corpus* is made, the return ★ shall first be read, and motion then made for [★ 599] discharging or remanding the prisoner, or amending or quashing the return.

244. On the argument of an order *nisi* for a writ of *habeas corpus* the Court may in its discretion direct an order to be drawn up for the prisoner's discharge, instead of waiting for the return of the writ, which order shall be a sufficient warrant to any gaoler or constable or other person for his discharge.

245. Upon the argument before the Court, on a return of a writ of *habeas corpus*, the party in whose favour judgment is given shall forthwith draw up an order in accordance with the decision of the Court at the Crown Office; and the writ, and return, and affidavits, shall be filed there. When the order has been made by a judge at chambers, the writ, and return, with the affidavits and a copy of the judge's order, shall be forthwith transmitted to the Crown Office to be filed.

B.—*Other writs of Habeas Corpus.*

246. Applications for writs of *habeas corpus ad testificandum*, *ad respondendum*, or *ad deliberandum* and *recipias*, must be made on affidavit to a judge at chambers.

247. An application to bring up a prisoner to give evidence on any cause or matter civil or criminal before any court, justice, or other judicature, may be made to a judge, on affidavit for an order.

248. An application for *habeas corpus ad deliberandum* and *recipias* shall be for two writs, the writ *ad deliberandum* to the gaoler to deliver the prisoner, and the writ *recipias* to the other gaoler to receive him.

249. When a prisoner is brought up by *habeas corpus* the counsel for the prisoner shall be first heard, and then the counsel for the Crown, and then one counsel for the prisoner in reply.

MOTIONS.

250. Order LII. of the Rules of the Supreme Court, 1883 (Motions), shall, as far as it is applicable, apply to all civil proceedings on the Crown side. The following rules shall apply to all proceedings on the Crown side.

251. Unless the Court or a judge give special leave to the contrary, there shall be at least two clear days between the service of a notice of motion and the day named in the notice for hearing it.

252. The following orders of course may be drawn up at the Crown office without any motion for the same:—

(*a.*) To appear, plead, and try (pursuant to recognizance).

(*b.*) To plead (except pleading double or several matters).

[★600] ★ (*c.*) To demur, join in demurrer, plead any subsequent plea.

(*d.*) To assign error.

(*e.*) To join in error.

(*f.*) To bring in body of prisoner under commitment from Queen's Bench Division, where a writ of *habeas corpus* is not necessary.

(*g.*) For *habeas corpus* in cases where process has issued from the Queen's Bench Division; or where upon writ of error the attendance of the party is necessarily required in court, or chambers, or at the Crown Office by the Court itself.

(*h.*) To a sheriff on a return of *cepi corpus* to bring in a prisoner within the proper time.

(*i.*) To return writs.

(*j.*) To tax costs.

(*k.*) To return re-stated cases.

(*l.*) To supersede attachment, or other process for compelling appearance where appearance has been entered.

(*m.*) For certiorari by consent for orders of sessions where a case has been stated, on such consent being signed by the solicitor or agent for the opposite party.

(*n.*) For an order *nisi* to quash orders or convictions removed by certiorari.

(*o.*) To make submission to reference an order of Court.

(*p.*) To make any other proceeding when necessary an order of Court.

(*q.*) For a view.

(*r.*) To summon a special jury.

(*s.*) To summon a jury on trial at bar.

253. All other orders shall, during the sittings, be made by the Court on motion supported by affidavit; but no affidavit shall be necessary for an order demandable as of right by the Crown, or where it is not necessary to state matters of fact.

254. Except as may be otherwise provided by these rules, all applications on the Crown side shall be made by way of motion to a Divisional Court for an order *nisi*.

255. The following applications shall be made upon two clear days' notice of motion, and be brought on as if they were ex parte motions and not put into the Crown paper.

(*a.*) For time, enlargement, stay, or security.

(*b.*) To strike a case out of the Crown paper.

(*c.*) To file a special case by leave of the Court.

(*d.*) To accelerate a case in the Crown paper on the ground of urgency.

(*e.*) To substitute a new relator on an information *quo warranto* for the original relator.

★(*f*) For costs to a defendant in criminal information [★601] to the amount of the recognizance.

256. When any motion is made under Rule 255 and founded on evidence by affidavit, a copy of such affidavit intended to be used shall be served with the notice of motion.

257. All cases of conviction and of orders, removed into court from any inferior jurisdiction, shall be entered for argument upon an order to shew cause why the conviction or order should not be quashed.

258. No order on the Crown side, except orders of course, shall be drawn up without the leave or order of the Court or a judge, or of the Queen's Coroner and Attorney, or the Master of the Crown Office.

259. If on the hearing of a motion or other application the Court or a judge shall be of the opinion that any person to whom notice has not been given ought to have or to have had such notice, the Court or judge may either dismiss the motion or application, or adjourn the hearing thereof, in order that such notice may be given, upon such terms, if any, as the Court or judge may think fit to impose.

260. The hearing of any motion or application may from time to time be adjourned upon such terms, if any, as the Court or judge shall think fit.

ATTACHMENT FOR CONTEMPT.

261. An application for an attachment for contempt shall be by motion for an order *nisi*. The service of an order *nisi* for an attachment shall be personal.

262. Every writ of attachment for contempt shall be made returnable in the Queen's Bench Division on a day certain during the sittings. In case of a return of *non est inventus* thereon one or more writs may issue tested on the return day of the previous writ.

263. If the sheriff returns *cepi corpus*, on application at the Crown Office, an order shall be drawn up for a writ of *habeas corpus* to issue to bring in the body of the defendant.

264. When the defendant is brought before the Court on the attachment, a motion may be made by the prosecutor, or if he does not make it, by the defendant, that he may be sworn to answer such questions or interrogatories as may be put to him by the prosecutor, and must give such bail to answer them before the Queen's Coroner and Attorney, or the Master of the Crown Office, as the Court may think fit, and for the master to proceed to examine the matter and report to the Court thereon.

265. In default of bail the defendant shall be committed to the ★Queen's Prison; but if at any time after he be pre- [★602] pared to give it, he may be brought before the Court or a judge on an order on the person in whose custody he is, which order shall be drawn up on application at the Crown Office for that purpose.

266. On the defendant being sworn an order may be drawn up at the Crown Office, and served on the prosecutor to file interrogatories within four days after the service thereof. If no interrogatories are filed at the end of the fourth day, on obtaining a certificate from the Queen's Coroner and Attorney, or Master of the Crown Office to that effect, the defendant shall be discharged out of custody by an order of the Court or a judge.

267. The answers to the interrogatories shall be signed by the defendant and also acknowledged by him before any Commissioner to administer oaths in the Supreme Court of Judicature.

268. On an intimation to one of the parties that the master is prepared with his report, a motion may be made on a four days' notice to be served on the other party, that the master on a day certain do make his report to the Court.

269. The defendant shall be present in court on the master's report being made. If he be in the Queen's Prison under process from the High Court, an order may be drawn up on application at the Crown Office for the Governor of the Queen's Prison to bring him into court; but if he be in custody in any other prison, or under process from any other court, the order shall be for a writ of *habeas corpus*, which order may be drawn up in like manner and such writ issued thereon.

270. If the defendant be out on bail, the prosecutor shall, if possible, give notice to the defendant and his bail that the defendant is required personally to attend the court on the report, and that if he does not so attend the Court will be moved to estreat the recognizance.

271. If the defendant be reported in contempt, the Court after hearing the parties on the report may either pronounce sentence at once or commit him to the Queen's Prison until some future day for that purpose, when an order shall be drawn up at the Crown Office directing the Governor of the Queen's Prison to bring the defendant into court.

272. On proceeding to sentence, affidavits in mitigation or aggravation may be read, and the defendant or his counsel heard, and the prosecutor's counsel be heard in reply.

273. If the defendant be sentenced to imprisonment, the order for sentence shall be lodged with the gaoler of the prison to which he is committed.

274. If the defendant is reported not to be in contempt, the [★ 603] Court ★may order him and his recognizances to be discharged, and with costs if the Court shall be of opinion that the prosecutor's complaint was groundless, and the attachment vexatious.

275. All interrogatories in writing on attachments shall be signed by counsel.

276. It shall be lawful for the Queen's Coroner and Attorney or the Master of the Crown Office to disallow any question or interrogatory that he considers irrelevant or otherwise improper.

TIME.

293. Order LXIV. of the Rules of the Supreme Court, 1883 (Time), shall, as far as it is applicable, apply to all civil proceedings on the Crown side.

The following Rules shall apply to all criminal proceedings on the Crown Side :—

294. In all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules or the practice of the Court, the same shall be reckoned exclusively of the first day and inclusively of the last day.

295. Where any limited time less than six days from and after any date or event is appointed or allowed for doing any act or taking any proceeding, Sunday, Christmas Day, and Good Friday shall not be reckoned in the computation of such limited time.

296. Where the time for doing any act or taking any proceeding expires on a Sunday or other days on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding shall, as far as regards the time of doing or taking the same, be held to be duly done or taken, if done or taken, on the day on which the office shall next be opened.

297. A Court or a judge shall have power to enlarge or abridge the time appointed by these Rules, or fixed by any order enlarging time for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require; and any such enlargement may be ordered at the discretion of the Court or a judge, although the application for the same is not made until after the expiration of the time appointed or allowed.

298. In all causes in which there have been no proceedings for one year from the last proceeding had, the party, whether prosecutor or defendant, who desires to proceed, shall give a calendar month's notice to the other party of his intention to proceed. A summons of a judge, on which no order has been made, shall not be deemed a proceeding within this Rule. Notice of trial, though afterwards countermanded, shall be deemed a proceeding within it.

★ AMENDMENT. [★ 604]

299. Order XXVIII. of the Rules of the Supreme Court, 1883 (Amendment), shall as far as is applicable, apply to all civil proceedings on the Crown side.

COSTS.

300. Order LXV. of the Rules of the Supreme Court, 1883 (Costs), shall, as far as it is applicable, apply to all civil proceedings on the Crown side.

301. Order LXV. of the Rules of the Supreme Court, 1883 (Costs), special and general regulations, Rule 27, shall, as far as it is applicable, apply to all criminal proceedings on the Crown side.

NOTICES.

302. Order LXVI. of the Rules of the Supreme Court, 1883 (Notices), shall, as far as it is applicable, apply to all civil proceedings on the Crown side.

NON-COMPLIANCE.

303. Order LXX. of the Rules of the Supreme Court, 1883 (Effect of non-compliance), shall, as far as it is applicable, apply to all proceedings on the Crown side, civil or criminal.

APPLICATIONS AT CHAMBERS.

304. In every proceeding, civil or criminal, on the Crown side chambers, the summons shall be issued from, and the order drawn up at, the Crown Office.

305. No summons to shew cause before a judge at chambers shall be issued in the following matters without the leave of a judge upon an ex parte application :—

(*a*) For a writ of mandamus.
(*b*) For a writ of certiorari.
(*c*) For a writ of *habeas corpus*.
(*d*) For a writ of prohibition.
(*e*) For bail in felony.

[★605] ★ INTERPRETATION CLAUSE.

306. In these Rules, unless repugnant to the context, the singular number shall include the plural, and the plural number shall include the singular.

"Crown side" means the Crown side of the Queen's Bench Division.

"Judge at chambers" shall include a judge at chambers in London and Elsewhere.

"Judgment" shall include order and conviction.

REPEAL.

307. Order LIII., Part II., of the Rules of the Supreme Court, 1883 (Prerogative mandamus), is hereby repealed.

FORMS.

308. The forms in the Appendix when applicable, and where not applicable forms of the like character as near as may be, shall be used in all proceedings on the Crown side.

(Signed) HALSBURY, C.
COLERIDGE, C.J.
ESHER, M.R.
JAMES HANNEN, Prest., P.D.A.
NATHL. LINDLEY, L.J.
EDW. FRY, L.J.
C. E. POLLOCK, B.
H. MANISTY, J.

December 18, 1885.

ORDER LXV., R. 27.

Special Allowances and General Provisions (made, so far as applicable, to apply to all Proceedings, Civil and Criminal on the Crown side by C. O. RR. 300, 301).

1. As to writs of summons requiring special indorsement, original special cases, pleadings and affidavits in answer to interrogatories, and other special affidavits, when the higher scale is applicable, the taxing officer may, in lieu of the allowances for instructions and preparing or drawing, make such allowance for work, labour, and expenses in or about the preparation of such documents as in his discretion he may think proper. Preparation of special documents.

2. As to drawing any pleading or other document, the fees allowed shall include any copy made for the use of the solicitor, agent, or client, or for counsel to settle. Copy of document for use.

3. As to instructions to sue or defend, or the preparation of briefs, if the taxing officer shall consider the fee in either scale inadequate, he may make such further allowance as he shall in his discretion consider reasonable. Instructions to sue or defend.

4. As to affidavits, when there are several deponents to be sworn, or it is necessary for the purpose of an affidavit being sworn to go to a distance, or to employ an agent, such reasonable allowance may be made as the taxing officer in his discretion may think fit. Affidavits.

5. The allowances for instructions and drawing an affidavit in answer to interrogatories and other special affidavits, and attending the deponent to be sworn, include all attendances on the deponent to settle and read over. Attendances to settle affidavits.

6. As to delivery of pleadings, services, and notices, the fees are not to be allowed when the same solicitor is for both parties, unless it be necessary for the purpose of making an affidavit of service. Services.

7. As to perusals the fees are not to apply where the same solicitor is for both parties. Perusals.

8. Where the same solicitor is employed for two or more defendants, and separate pleadings are delivered or other proceedings had by or for two or more such defendants separately, the taxing officer shall consider in the taxation of such solicitor's bill of costs, either between party and party or between solicitor and client, whether such separate ★ pleadings or other pro- [★607] ceedings were necessary or proper, and if he is of opinion that any part of the costs occasioned thereby has been unnecessarily or improperly incurred, the same shall be disallowed. Separate answers or proceedings by the same solicitor.

9. As to evidence, such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence, and the attendance of witnesses, are to be allowed. Evidence.

[See *Mackley* v. *Chillingworth*, L. R. 2 C. P. D. 273; *Turnbull* v. *Janson*, L. R. 3 C. P. D. 264.]

Agency correspondence.

10. As to agency correspondence, in country agency causes and matters, if it be shewn to the satisfaction of the taxing officer that such correspondence has been special and extensive, he is to be at liberty to make such special allowance in respect thereof as in his discretion he may think proper.

[11 *refers to Chancery proceedings.*]

Attendance at judges' chambers.

12. As to attendances at the Judges' Chambers, where, from the length of the attendance, or from the difficulty of the case, the judge or master shall think the highest of the fees an insufficient remuneration for the services performed, or where the preparation of the case or matter to lay it before the judge or master in chambers, or on a summons, shall have required skill and labour for which no fee has been allowed, the judge or master may allow such fee in lieu of the fee of 1*l.* 1*s.* above provided, not exceeding 2*l.* 2*s.*, or where the higher scale is applicable 3*l.* 3*s.*, or in proceedings to wind up a company 5*l.* 5*s.*, as in his discretion he may think fit; and where the preparation of the case or matter to lay it before a judge at chambers on a summons shall have required and received from the solicitor such extraordinary skill and labor as materially to conduce to the satisfactory and speedy disposal of the business, and therefore shall appear to the judge to deserve higher remuneration than the ordinary fees, the judge may allow to the solicitor, by a memorandum in writing expressly made for that purpose and signed by the judge, specifying distinctly the grounds of such allowance, such fee, not exceeding 10 guineas, as in his discretion he may think fit, instead of the above fees of 2*l.* 2*s.*, 3*l.* 3*s.* and 5*l.* 5*s.*

Abortive attendance at chambers.

13. As to attendances at the Judges' Chambers, where, by reason of the non-attendance of any party (unless it be considered expedient to proceed ex parte, or where by reason of the neglect of any party in not being prepared with any proper evidence, account, or other proceeding), the attendance is adjourned without any useful progress being made, the judge may order such an amount of costs (if any) as he shall think reasonable to be paid to the party attending by the party so absent or neglectful, or by his solicitor personally; and the party so absent or neglectful is not to be allowed any fee as against any other party, or any estate or fund in which any other party is interested.

Length of a folio.

[★608] ★14. A folio is to comprise seventy-two words, every figure comprised in a column or authorized to be used being counted as one word.

Consulting counsel.

15. Such costs of procuring the advice of counsel on the pleadings, evidence, and proceedings in any cause or matter as the taxing officer shall in his discretion think just and reasonable, and of procuring counsel to settle such pleadings and special affidavits as the taxing officer shall in his discretion think proper to be settled by counsel, are to be allowed; but as to affidavits a separate fee is not to be allowed for each affidavit, but one fee for all the affidavits proper to be so settled, which are or ought to be filed at the same time.

Attendance of counsel at chambers.

16. As to counsel attending at Judges' Chambers, no costs thereof shall in any case be allowed, unless the judge certifies it to be a proper case for counsel to attend.

Inspection of documents.

17. As to inspection of documents under Order XXXI., rule 14, no allowance is to be made for any notice or inspection, unless it is shewn to the satisfaction of the taxing officer that there were good and sufficient reasons for giving such notice and making such inspection.

18. As to taking copies of documents in possession of another

party, or extracts therefrom, under Rules of Court or any special order, the party entitled to take the copy or extract is to pay the solicitor of the party producing the document for such copy or extract as he may, by writing, require, at the rate of fourpence per folio; and if the solicitor of the party producing the document refuses or neglects to supply the same, the solicitor requiring the copy or extract is to be at liberty to make it, and the solicitor for the party producing is not to be entitled to any fee in respect thereof. Copies of documents in possession of another party.

[19 *relates to Chancery Division.*]

20. The Court or judge may, at the hearing of any cause or matter, or upon any application or procedure in any cause or matter in court or at chambers, and whether the same is objected to or not, direct the costs of any pleading, affidavit, evidence, notice to produce, admit or cross examine witnesses, account, statement, procuring discovery by interrogatories or order, applications for time, bills of costs, service of notice of motion or summons, or other proceedings, or any part thereof, which is improper, vexatious, unnecessary, or contains vexatious or unnecessary matter, or is of unnecessary length, or caused by misconduct or negligence, to be disallowed, or may direct the taxing officer to look into the same and to disallow the costs thereof, or of such part thereof as he shall find to be improper, unnecessary, vexatious, or to contain unnecessary matter, or to be of unnecessary length; and in such case the party whose costs are so disallowed shall pay the costs occasioned to the other parties by such unnecessary proceeding, matter or length, or caused by misconduct or negligence; and in such case the party whose costs are so disallowed shall pay the costs ★ occasioned there- [★ 609] by to the other parties: and in any case where such question shall not have been raised before and dealt with by the Court or judge, it shall be the duty of the taxing officer to look into the same (and, as to evidence, although the same may be entered as read in any decree or order) for the purpose aforesaid, and thereupon the same consequences shall ensue as if he had been specially directed to do so; and in the Queen's Bench Division the Master shall make such order as may be required to effect the object of this regulation. Disallowance of costs of unnecessary proceeding.

21. In any case in which, under the last preceding regulation, or any other rule of Court, or by the order or direction of a Court or judge, or otherwise, a party entitled to receive costs is liable to pay costs to any other party, the taxing officer may tax the costs such party is so liable to pay, and may adjust the same by way of deduction or set-off, or may, if he shall think fit, delay the allowance of the costs such party is entitled to receive until he has paid or tendered the costs he is liable to pay; or such officer may allow or certify the costs to be paid, and direct payment thereof, and the same may be recovered by the party entitled thereto in the same manner as costs ordered to be paid may be recovered. Set-off of costs.

[22 *relates to Chancery Division.*]

23. Where any party appears upon any application or proceeding in court or a chambers, in which he is not interested, or upon which, according to the practice of the Court, he ought not to attend, he is not to be allowed any costs of such appearance unless the Court or judge shall expressly direct such costs to be allowed. Unnecessary appearance at chambers

24. The costs of applications to extend the time for taking any proceedings shall be in the discretion of the taxing officer, unless the Court or judge shall have specially directed how the costs Costs of application

to extend time.

are to be paid or borne. The taxing officer shall not allow the costs of more than one extension of time, unless he is satisfied that such extension was necessary, and could not with due diligence have been avoided. The costs of a summons to extend time shall not be allowed in cases to which rule 8 of Order LXIV. applies, unless the party taking out such summons has previously applied to the opposite party to consent, and he has not given a consent to a sufficient extension of time, or the taxing officer shall consider there was a good reason for not making such application; and in case the taxing officer shall not allow the costs of such summons and shall consider that the party applying ought to pay the costs of any other party occasioned thereby, he may direct such payment or deal with such costs in the manner provided by Regulation 21.

General powers of taxing officers.

25. The taxing officers of the Supreme Court, or of any division thereof, shall, for the purpose of any proceeding before them, have power and authority to administer oaths, and shall, [★610] in relation to the ★ taxation of costs, perform all such duties as have heretofore been, or are by general orders directed to performed by any of the masters, taxing masters, registrars, or other officers of any of the courts whose jurisdiction is by the Act transferred to the High Court of Justice or Court of Appeal, and shall, in respect thereof, have such powers and authorities as previous to the commencement of the Act were vested in any of such officers, including examining witnesses, directing production of books, papers, and documents, making separate certificates or allocaturs, requiring any party to be represented by a separate solicitor, and to direct and adopt all such other proceedings as could be directed and adopted by any such officer on references for the taxation of costs, and taking accounts of what is due in respect of such costs, and such other accounts connected therewith as may be directed by the Court or a judge.

[26 *and* 27 *relate to peculiar cases.*]

Neglect or refusal to bring in costs.

28. When any party entitled to costs refuses or neglects to bring in his costs for taxation, or to procure the same to be taxed, and thereby prejudices any other party, the taxing officer shall be at liberty to certify the costs of the other parties, and certify such refusal or neglect, or may allow such party refusing or neglecting a nominal or other sum for such costs, so as to prevent any other party being prejudiced by such refusal or neglect.

Taxations between party and party.

29. As to costs to be paid or borne by another party, no costs are to be allowed which do not appear to the taxing officer to have been necessary or proper for the attainment of justice or defending the rights of the party, or which appear to the taxing officer to have been incurred through over-caution, negligence, or mistake, or merely at the desire of the party.

Work and labour not specially provided for.

30. As to any work and labour properly performed and not herein provided for, and in respect of which fees have heretofore been allowed, the same or similar fees are to be allowed for such work and labour as have heretofore been allowed.

Costs occasioned by amendments of plaintiff's pleadings.

31. Where the plaintiff is directed to pay to the defendant the costs of the cause, the costs occasioned to a defendant by any amendment of the plaintiff's pleadings shall be deemed to be part of such defendant's costs in the cause (except as to any amendment which shall appear to have been rendered necessary by the default of such defendant); but there shall be deducted from such costs any sum which may have been paid by the plaintiff according to the course of the Court at the time of any amendment.

Defendant's

32. Where upon taxation a plaintiff who has obtained a judg-

ment with costs is not allowed the costs of any amendment of his pleadings on the ground of the same having been unnecessary, the defendant's costs occasioned by such amendment shall be taxed, and the amount ★ thereof deducted from [★ 611] the costs to be paid by the defendant to the plaintiff. costs where plaintiff's amendment disallowed.

33. Where an action or petition is dismissed with costs, or a motion is refused with costs, or any costs are by any general or special order directed to be paid, the taxing officer may tax such costs without any order referring the same for taxation, unless the Court or a judge upon the application of the party alleging himself to be aggrieved prohibits the taxation of such costs. Taxation where action, &c., dismissed with costs.

34. Where it is directed that costs shall be taxed in case the parties differ about the same, the party claiming the costs shall bring the bill of costs into the office of the proper taxing officer, and give notice of his having so done to the other party, and at any time within eight days after such notice such other party shall have liberty to inspect the same without fee, if he thinks fit. And at or before the expiration of the eight days, or such further time as the taxing officer shall in his discretion allow, such other party shall either agree to pay the costs or signify his dissent therefrom, and shall thereupon be at liberty to tender a sum of money for the costs; but where he makes no such tender, or where the party claiming the costs refuses to accept the sum so tendered, the taxing officer shall proceed to tax the costs; and where the taxed costs shall not exceed the sum tendered, the costs of the taxation shall be borne by the party claiming the costs. Proceedings where costs directed to be taxed in case parties differ.

35. Where any costs are by any judgment or order directed to be taxed and to be paid out of any money or fund in court, the taxing officer in his certificate of taxation shall state the total amount of all such costs as taxed without any direction for that purpose in such judgment or order. Total amount to be stated where costs to be paid out of funds in court.

36. The allowances in respect of fees to the Conveyancing Counsel of the Court, and to any accountants, merchants, engineers, actuaries, and other scientific persons to whom any question is referred, shall be regulated by the taxing officers, subject to appeal to the Court or judge, whose decision shall be final. Allowances for scientific witnesses, &c.

37. The rules, orders, and practice of any Court whose jurisdiction is transferred to the High Court of Justice or Court of Appeal, relating to costs, and the allowance of the fees of solicitors and attorneys, and the taxation of costs, existing prior to the commencement of the principal Act, shall, in so far as they are not inconsistent with the Principal Act and these Rules, remain in force and be applicable to costs of the same or analogous proceedings, and to the allowance of the fees of solicitors of the Supreme Court and the taxation of costs in the High Court of Justice and Court of Appeal. Application of former rules, orders and practice.

38. As to all fees or allowances which are discretionary, the same are, unless otherwise provided, to be allowed at the discretion of the taxing officer, who, in the exercise of such discretion, is to take into ★ consideration the other fees and al- [★ 612] lowances to the solicitor and counsel, if any, in respect of the work to which any such allowance applies, the nature and importance of the cause or matter, the amount involved, the interest of the parties, the fund or persons to bear the costs, the general conduct and costs of the proceedings, and all other circumstances: and where a party is entitled to sign judgment for his costs, the taxing officer, in taxing the costs, may allow a fixed sum for the costs of the judgment. Discretion of taxing officer.

Objection to taxation.

39. Any party who may be dissatisfied with the allowance or disallowance by the taxing officer, in any bill of costs taxed by him, of the whole or any part of any item or items, may, at any time before the certificate or allocatur is signed, deliver to the other party interested therein, and carry in before the taxing officer, an objection in writing to such allowance or disallowance, specifying therein by a list, in a short and concise form, the item or items, or parts or part thereof, objected to, and may thereupon apply to the taxing officer to review the taxation in respect of the same.

Review of taxation by taxing officer.

40. Upon such application the taxing officer shall reconsider and review his taxation upon such objections, and he may, if he shall think fit, receive further evidence in respect thereof, and, if so required by either party, he shall state either in his certificate of taxation or allocatur, or by reference to such objection, the grounds and reasons of his decision thereon, and any special facts or circumstances relating thereto.

Review of taxation by judge.

41. Any party who may be dissatisfied with the certificate or allocatur of the taxing officer, as to any item or part of an item which may have been objected to as aforesaid, may, within fourteen days from the date of the certificate or allocatur, or such other time as the Court or judge, or taxing officer, at the time he signs his certificate or allocatur, apply to a judge at chambers for an order to review the taxation as to the same item or part of an item, and the judge may thereupon make such order as to the judge may seem just; but the certificate or allocatur of the taxing officer shall be final and conclusive as to all matters which shall not have been objected to in manner aforesaid.

[See *Sparrow* v. *Hill* (L. R. 7 Q. B. D. 362).]

Evidence thereon.

42. Such application shall be heard and determined by the judge upon the evidence which shall have been brought in before the taxing officer, and no further evidence shall be received upon the hearing thereof, unless the judge shall otherwise direct.

[43 *refers to District Registries.*]

Retainer.

44. No retaining fee to counsel shall be allowed on taxation between party and party.

Allowances of counsel's fees for settling &c.

45. Fees for conferences are not to be allowed in any cause or [★ 613] ★ matter in addition to the solicitor's and counsel's fees for drawing and settling, or perusing and pleadings, affidavits, deeds, or other proceedings or abstracts of title, or for advising thereon, unless it shall appear to the taxing officer for some special reason that a conference was necessary or proper.

One counsel in county court cases.

46. In any case in which under Rule 12 of this Order the scale of costs in county courts is applicable, the costs of briefing more than one counsel shall not be allowed, unless the taxing officer shall, for special reasons, be of opinion that briefing more than one counsel was proper.

Allowance of two junior counsel.

47. Where the costs of retaining two counsel may properly be allowed, such allowance may be made although both such counsel may have been selected from the outer bar.

Refresher.

48. As to refresher fees, when any cause or matter is to be tried or heard upon *viva voce* evidence in open court, if the trial shall extend over more than one day, and shall occupy either on the first day only, or partly on the first and partly on a subsequent day or days, more than five hours, without being concluded, the taxing officer may allow, for every clear day subsequent to that on which the five hours shall have expired, the following fees:—

To the leading counsel . . from 5 to 10 guineas.
To the second, if three counsel . " 3 to 7 "
To the third, if three counsel, or the second, if only two . . " 3 to 5 "

The like allowances may be made where the evidence in chief is not taken *viva voce*, if the trial on hearing shall be substantially prolonged beyond such period of five hours, to be so computed as aforesaid, by the cross-examination of witnesses whose affidavits or depositions have been used.

Premature delivery of briefs.

49. Where a cause or matter shall not be brought on for trial or hearing, the costs of and consequent on the preparation and delivery of briefs shall not be allowed if the taxing officer shall be of opinion that such costs were prematurely incurred.

Where cause struck out.

50. Where a cause or matter which stands for trial is called on to be tried, but cannot be decided by reason of a want of parties or other defect on the part of the plaintiff, and is therefore struck out of the paper, and the same cause is again set down, the defendant shall be allowed the taxed costs occasioned by the first setting down, although he does not obtain the costs of the cause or matter.

Fees to counsel's clerks.

51. The following fees are to be allowed to counsel's clerks:—

	£	s.	d.	
Upon a fee under 5 guineas .	0	2	6	
5 guineas and under 10 guineas .	0	5	0	
10 guineas and under 20 guineas .	0	10	0	
★ 20 guineas and under 30 guineas .	0	15	0	[★614]
30 guineas and under 50 guineas .	1	0	0	
30 guineas and upwards per cent.	2	10	0	
On consultations, senior's clerk .	0	5	0	
On consultations, junior's clerk .	0	2	6	
On conferences	0	5	0	
On retainers (where allowed):—				
General retainer	0	10	6	
Common retainer	0	2	6	

Voucher of counsel's fees necessary.

52. No fee to counsel shall be allowed on taxation unless vouched by his signature.

Office copies of affidavits when unnecessary.

53. In cases in which an original affidavit can be used, and to which Order XXXVIII., Rule 15, applies, it shall not be necessary to take an office copy.

54. It shall not be necessary to take an office copy of an affidavit of discovery of documents, and the copy delivered by the party filing it may be used as against such party.

Solicitor personally to pay costs of neglect or improper conduct.

55. Where, in proceedings before the taxing officer, any party is guilty of neglect or delay, or puts any other party to any unnecessary or improper expense relative to such proceedings, the taxing officer may direct such party or his solicitor to pay such costs as he may think proper, or deal with them under Regulation 21.

Supension of taxation in certain cases.

56. Where in any cause or matter any bill of costs is directed to be taxed for the purpose of being paid or raised out of any fund or property, the taxing officer may, if he shall consider there is a reasonable ground for so doing, require the solicitor to deliver or send to his clients, or any of them, free of charge, a copy of such bill, or any part thereof, previously to such officer completing the taxation thereof, accompanied by any statement such officer may direct, and by a letter informing such client that the bill of costs has been referred to the taxing officer, giving his name and address for taxation, and will be proceeded with at the time the officer shall have appointed for this purpose, and such officer may suspend taxation for such time as he may consider reasonable.

Extension of time for taxation.

57. The taxing officer shall have power to limit or extend the time for any proceeding before him, and where, by any general order, or any order of the Court or a judge, a time is appointed for any proceeding before or by a taxing officer, unless the Court or judge shall otherwise direct, such officer shall have power from time to time to extend the time appointed upon such terms (if any) as the justice of the case may require, and although the application for the same is not made until after the expiration of [★ 615] the time appointed, it shall not ★ be necessary to make a certificate or order for this purpose, unless required for any special purpose.

Indorsement of bill of costs.

58. Every bill of costs which shall be left for taxation shall be endorsed with the name and address of the solicitor by whom it is so left, and also the name and address of the solicitor, if any, for whom he is agent, including any solicitor who is entitled or intended to participate in the costs to be so taxed.

TABLE OF COURT FEES TO BE TAKEN IN THE CROWN OFFICE DEPARTMENT.

WRITS AND SUMMONSES.

	£	s.	d.
1. On sealing a writ of mandamus	1	0	0
2. On sealing a writ of subpœna for witnesses, not exceeding three persons	0	5	0
3. On sealing every other writ	0	5	0
4. On sealing or issuing an originating summons, under the Act 6 & 7 Vict. c. 73, for the taxation of a solicitor's bill of costs within twelve months after delivery, or delivery of a bill of costs by a solicitor, including the order to be made thereon	0	10	0
5. On sealing any other originating summons	0	10	0
6. On amending the same	0	5	0
7. On sealing or issuing a summons for directions under Order XXX	0	10	0
8. On sealing or issuing any other summons	0	3	0

APPEARANCES AND PLEAS.

9. On entering an appearance, for each person	0	2	0
10. On entering a plea for each person	0	5	0

COPIES.

11. On a copy of a written disposition of a witness to enable a party to print same, for each folio	0	0	4
12. On examining a written or printed copy and marking or sealing same as an office copy, for each folio	0	0	2
13. On making a copy and marking same as an office copy, for each folio	0	0	6
14. On a copy in a foreign language	The actual cost.		

£ s. d.

[★616] ★ 15. On a copy of a plan, map, section, drawing, photograph, or diagram — The actual cost.

ATTENDANCES.

	£	s.	d.
16. On an application, with or without a subpœna, for any officer to attend as a witness, or to produce any record or document to be given in evidence (in addition to the reasonable expenses of the officer), for each day or part of a day he shall necessarily be absent from his office.	1	0	0
The officer may require a deposit of stamps on account of any further fees, and a deposit of money on account of any further expenses, which may probably become payable beyond the amount paid for fees and expenses on the application, and the officer or his clerk taking such deposit shall thereupon make a memorandum thereof on the application.			
The officer may also require an undertaking in writing to pay any further fees and expenses which may become payable beyond the amounts so paid and deposited.			

OATHS, &c.

17 On taking an affidavit or an affirmation or attestation upon honour in lieu of an affidavit or a declaration, for each person making same . .	0	1	6
18. And in addition thereto, for each exhibit therein referred to and required to be marked . . .	0	1	0

FILING.

19. On filing a special case	1	0	0
20. If on appeal from an inferior court	0	10	0
21. On filing an affidavit, writ of execution with return, recognizances, and every other proceeding or document required to be filed	0	2	6

CERTIFICATES.

22. On a certificate of appearance, or of a pleading, affidavit, or proceeding having been entered, filed, or taken, or of the negative thereof, unless otherwise provided	0	2	6
23. Or if a certificate of proceedings pursuant to Order LXI., Rule 24.	0	5	0

★ SEARCHES AND INSPECTIONS. [★617]

	£	s.	d.
24. On an application to search for an an appearance and inspecting same	0	1	0
25. On an application to search an index and inspect a pleading, judgment, order, or other record, unless otherwise expressly provided for by any Act of Parliament, for each hour or part of an hour occupied	0	2	6
26. Not exceeding one day	0	10	0

HEARING.

		£	s.	d.
27.	On entering or setting down, or re-entering or re-setting down, an appeal to the Court of Appeal, or a cause, matter, or proceeding required to be entered in the Crown Paper, but not any interlocutory motion or application arising out of any cause, matter, or proceeding in respect of which such fee shall have been previously paid by the party entering . . .	2	0	0
28.	If an appeal from an inferior court to the High Court	1	0	0

JUDGMENTS AND ORDERS.

On drawing up and entering Judgments and Orders:—

29.	If an order made in Court ordering a judgment to be entered, or an order in the nature of a judgment, or on the hearing of a special case, unless otherwise directed	1	0	0
30.	If on an appeal from an inferior court	0	10	1
31.	If on any application to the Court of Appeal .	1	0	0
32.	If an Order of Course, under the Act 6 & 7 Vict. c. 73, to tax a solicitor's bill of costs within 12 months after delivery, or for delivery of a bill of costs by a solicitor where fee No. 4 (on the summons) is not applicable	0	10	0
33.	If an Order of Course or any other Order . . .	0	5	0
34.	On signing a note or memorandum of an Order pursuant to Order LII., Rule 14, where no Order is required for production, where no Order is drawn up	0	3	0

ON PROCEEDINGS BEFORE A MASTER.

35.	On every reference, investigation, or inquiry, including examination of witnesses, if any, for every hour or part of an hour the officer is occupied	0	10	0

[★618] ★ TAXATION OF COSTS.

		£	s.	d.
36.	On taxing a bill of costs, where the amount allowed does not exceed £4	0	2	0
37.	Where the amount exceeds £4, for every pound allowed or a fraction thereof	0	1	0

These fees, unless otherwise provided, shall be taken on signing the certificate, or on the allowance of the bill of costs as taxed; but the fees shall be due and payable, if no certificate or allocatur is required, on the amount of the bill as taxed, or on the amount of such part thereof as may be taxed, and the solicitor or party suing in person shall in such case cause the proper stamps (the

amount thereof to be fixed by the officer) to be impressed on or affixed to the bill of costs.

The taxing officer may require a deposit of stamps on account of fees before taxation, not exceeding the fees on the full amount of the costs as submitted for taxation, and the officer or his clerk on taking such deposit shall make a memorandum thereof on the bill of costs.

MISCELLANEOUS.

38. On an allowance of a table of fees	1	0	0
39. On a fiat of a judge	0	5	0
40. On taking a recognizance or bail	0	10	0
41. On a commitment	0	5	0
42. On signing an information	0	10	0
43. On nominating and reducing a jury pursuant to the County Juries Act, 1825, and the Juries Act, 1870	1	0	0

We concur in respect of the above fees,

(Signed) CHARLES DALRYMPLE,
W. H. WALROND,

Two of the Commissioners of Her Majesty's Treasury.

[★619]

★APPENDIX N.

TO THE SUPREME COURT RULES AND ORDERS, 1883.

COSTS.

	Higher Scale.			Lower Scale.		
	£	s.	d.	£	s.	d.
Writ of mandamus	1	1	0	0	10	0
Or per folio	0	1	4	0	1	4
Writ of *subpœna ad testificandum* or *duces tecum*	0	6	8	0	6	8
And if more than four folios, for each folio beyond four	0	1	4	0	1	4
Writ or writs of *subpœna ad testificandum* for any number of persons not exceeding three, and the same for every additional number not exceeding three	0	6	8	0	6	8
Writ of *distringas*, pursuant to statute 5 Vict. c. 5.	0	13	4	0	13	4
Writ of execution, or other writ to enforce any judgment or order	0	10	0	0	7	0
And if more than four folios, for each folio beyond four	0	1	4	0	1	4
Procuring a writ of execution or notice to the sheriff, marked with a seal of renewal	0	6	8	0	6	8
Notice thereof to serve on sheriff	0	5	0	0	4	0
Any writ not included in the above	0	10	0	0	7	0
These fees include all indorsements and copies, or *præcipes*, for the officer sealing them, and attendances to issue or seal, except where otherwise provided, but not the Court fees.						
Summonses to attend Judges' Chambers	0	6	8	0	3	0
Or if special, at taxing officer's discretion, not exceeding	1	1	1	0	13	4
Copy for the judge, when required	0	2	0	0	2	0
Or per folio	0	0	4	0	0	4
SERVICES AND NOTICES.						
Service or filing in lieu of service, of any writ, summons, warrant, interrogatories, petition, order, or notice on a party who has not entered an appearance, and if not authorized to be served by post	0	5	0	0	5	0
If served at a distance of more than two miles from the nearest place of business, or office of the solicitor serving the same, for each mile beyond such two miles therefrom	0	1	0	0	1	0
Where, in consequence of the distance of the party to be served, it is proper to effect such service through an agent (other than the London agent), for correspondence in addition	0	7	0	0	7	0
Where more than one attendance is necessary to effect service, or to ground an application for substituted						

	Higher Scale. £	s.	d.	Lower Scale. £	d.	s.
★ service, such further allowance may be made [★ 620] as the taxing officer shall think fit.						
For service out of the jurisdiction such allowance is to be made as the taxing officer shall think fit.						
Service where an appearance has been entered on the solicitor or party	0	2	6	0	2	6
Or if authorized to be served by post	0	1	6	0	1	6
Where any writ, order, and notice, or any two of them, have to be served together, one fee only for service is to be allowed.						
In addition to the above fees, the following allowances are to be made :—						
As to writs, if exceeding two folios, for copy for service per folio beyond such two	0	0	4	0	0	4
As to summons to attend at the Judge's Chambers, for each copy to serve	0	2	0	0	1	0
Or per folio	0	0	4	0	0	4
For preparing notice to produce on the trial or hearing of an action, or notice to admit	0	7	6	0	5	0
If special or necessarily long, such allowance as the taxing officer shall think proper, not exceeding per folio	0	1	0	0	0	8
And for each copy, such allowance as the taxing officer shall think proper, not exceeding per folio	0	0	4	0	0	4
For preparing notice of motion	0	5	0	0	3	0
Or per folio	0	1	0	0	1	0
Copy for service	0	1	0	0	1	0
Or per folio	0	0	4	0	0	4
Or if special, and necessarily exceeding three folios, for preparing same, for each folio beyond three	0	1	0	0	1	0
And for each copy for service per folio beyond such three	0	0	4	0	0	4
Copies for service of interrogatories and petitions, and of orders with necessary notices (if any) to accompany, per folio	0	0	4	0	0	4
Except as otherwise provided, the allowances for services include copies for service.						
Where notice of filing affidavits is required, only one notice is to be allowed for a set of affidavits filed, or which ought to be filed together.						
Where any appointment is or ought to be adjourned, service of a notice of the adjournment, or next appointment, is not to be allowed.						
APPEARANCES.						
Entering any appearance	0	6	8	0	6	8
If entered at one time, for more than one person, for every defendant beyond the first	0	2	0	0	1	0
INSTRUCTIONS.						
To sue or defend	0	13	4	0	6	8
For statement of claim or special case	2	2	0	0	13	4
For indorsement of writ of summons when no further statement of claim	1	1	0	0	13	4

	Higher Scale.			Lower Scale.		
	£	s.	d.	£	s.	d.
[★621] ★ For defence or further defence	0	13	4	0	6	8
For reply when defendant sets up a counterclaim	1	1	0	0	13	4
For reply or further reply in any other case with or without joinder of issue	0	13	4	0	6	8
For confession of defence	0	13	4	0	6	8
For joinder of issue without other matter	0	13	4	0	6	8
For special petition, any other pleading (not being a summons), and interrogatories for examination of a party or witness	0	13	4	0	6	8
To amend any pleading	0	13	4	0	6	8
For affidavit in answer to interrogatories, and other special affidavits	0	6	8	0	6	8
To appeal against order of Court or judge and to appear thereon	1	1	0	0	13	4
To add parties by order of Court or judge	0	13	4	0	6	8
For counsel to advise on evidence when the evidence in chief is to be taken orally	0	6	8	0	6	8
Or not to exceed	1	1	0	1	1	0
For counsel to make any application to a Court or judge where no other brief	0	10	0	0	6	8
For brief on motion for special injunction	1	1	0	0	13	4
For brief on hearing or trial of action upon notice of trial or notice for judgment given, whether such trial be before a judge, with or without a jury, or before an official or special referee, or on trial of an issue of fact before a judge, commissioner, or referee, or on assessment of damages	2	2	0	1	1	0
For such brief, and for brief on the hearing of an appeal when witnesses are to be examined or cross-examined, such fee may be allowed as the taxing officer shall think fit, having regard to all the circumstances of the case, and to other allowances, if any, for attendances on witnesses and procuring evidence.						
The fees for instructions for brief are to apply to a hearing on further consideration in court only where an order for accounts and inquiries was made without such hearing or trial, as above mentioned.						
DRAWING PLEADINGS AND OTHER DOCUMENTS.						
Statement of claim	1	1	0	0	10	0
Or per folio	0	1	0	0	1	0
Defence	0	10	0	0	5	0
Or per folio	0	1	0	0	1	0
Counterclaim	1	1	0	0	5	0
Or per folio	0	1	0	0	1	0
Reply, with or without joinder of issue, confession of defence, joinder of issue without other matter, and any other pleading (not being a petition or summons) and amendments of any pleading	0	10	0	0	5	0
Or per folio	0	1	0	0	1	0
Particulars, breaches, and objections, when required and one copy to deliver	0	6	8	0	5	0
Or such amount as the taxing officer shall think fit, not exceeding per folio	0	1	0	0	0	8

	Higher Scale.			Lower Scale.		
	£	s.	d.	£	s.	d.
★ If more than one copy to be delivered, for [★ 622] each other copy, per folio	0	0	4	0	0	4
Special case, whether original or in an action, affidavits in answer to interrogatories and other special affidavits, special petitions, and interrogatories, per folio	0	1	0	0	1	0
Brief, on trial or hearing of cause, issue of fact, assessment of damages, examination of witnesses, special case and petition before a Court or judge, sheriff, commissioner, referee, examiner, or officer of the court, when necessary and proper in addition to pleadings, including necessary and proper observations, per folio	0	1	0	0	1	0
Brief on application to add parties	0	10	6	0	6	8
Or per folio	0	1	0	0	6	8
Brief on further consideration, per sheet of 10 folios	0	6	8	0	1	0
Accounts, statements, and other documents for the Judge's Chambers, when required, not exceeding per folio	0	1	0	0	0	8
Advertisements to be signed by judge's clerk, including attendance therefor	0	13	4	0	6	8
Bills of costs for taxation, including copy for the taxing officer	0	0	8	0	0	8
COPIES.						
Of pleadings, briefs, and other documents where no other provision is made, at per folio	0	0	4	0	0	4
Where, pursuant to Rules of Court any pleading, special case or petition of right, or evidence is printed, the solicitor of the party printing shall be allowed for a copy for the printer (except when made by the officer of the court), at per folio	0	0	4	0	0	4
And for examining the proof print, at per folio	0	0	2	0	0	2
And for printing the amount actually and properly paid to the printer, not exceeding per folio	0	1	0	0	1	0
And in addition for every 20 beyond the first 20 copies, at per folio	0	0	1	0	0	1
And where any part shall properly be printed in a foreign language, or as a fac-simile, or in any unusual or special manner, or where any alteration in the document being printed becomes necessary after the first proof, such further allowance shall be made as the taxing officer shall think reasonable.						
These allowances are to include all attendances on the printer.						
The solicitor for a party entitled to take printed copies shall be allowed, for such number of copies as he shall necessarily or properly take, the amount he shall pay therefor.						
In addition to the allowances for printing and taking printed copies, there shall be allowed for such printed copies as may be necessary or proper for the following, but for no other purposes (videlicet):						
Of any pleading for delivery to the opposite party, or filing in default of appearance.						
Of any special case for filing.						

	Higher Scale. £	s.	d.	Lower Scale. £	s.	d.
[★ 623] ★ Of any affidavit to be sworn to in print. And of any pleading, special case, petition of right, or evidence for the use of counsel in court, and in country agency causes when proper to be sent as a close copy for the use of the country solicitor, at per folio	0	0	3	0	0	2
Such additional allowances for printed copies for the Court or judge, and for counsel, are not to be made where written copies have been made previously to printing, and are not in any case to be made more than once in the progress of the cause						
Close copies, whether printed or written, are not to be allowed as of course, but the allowance is to depend on the propriety of making or sending the copies, which in each case is to be shown and considered by the taxing office.						
Inserting amendments in a printed copy of any pleading, special case, or petition of right, when not reprinted	0	5	0	0	1	0
Or per folio	0	0	4	0	0	4
PERUSALS.						
Of statement of claim, defence, reply, joinder of issue, and other pleading (not being a petition in a pending cause or matter, or summons other than an originating summons), by the solicitor of the party to whom the same are delivered	0	13	4	0	6	8
Or per folio	0	0	4	0	0	4
Of amendment of any such pleading in writing	0	6	8	0	6	8
Or per folio	0	0	4	0	0	4
If same reprinted	0	13	4	0	6	8
Or per folio of amendment	0	0	4	0	0	4
Of interrogatories to be answered by a party by his solicitor	0	13	4	0	6	8
Or per folio	0	0	4	0	0	4
Of special case by the solicitor of any party except the one by whom it is prepared	0	13	4	0	6	8
Or per folio	0	0	4	0	0	4
Of copy order to add parties, notice of defendant's claim against any person not a party to the action under Order XVI., rule 49, and of defendant's defence and counterclaim served on a person not a party under Order XXI., rule 13, by the solicitor of the party served therewith, and in these several cases the perusal of the plaintiff's statement of claim is also to be allowed unless the solicitor has been previously allowed such perusal	0	13	4	0	6	8
Or per folio	0	0	4	0	0	4
Of notice to produce on trial or hearing of action, and notice to admit by the solicitor of the party served	0	13	4	0	6	8
Or (if to admit facts) under Order XXXII., rule 4, per folio	0	1	0	0	1	0
Of affidavit in answer to interrogatories by the solicitor of the party interrogating, and of the other special affidavits by the solicitor of the party against whom the same can be read, per folio	0	0	4	0	0	4

★ ATTENDANCES. [★ 624]	Higher Scale. £	s.	d.	Lower Scale. £	s.	d.
To deliver, or file in lieu of delivery, any pleading (not being a petition or summons) and a special case . .	0	6	8	0	3	4
To inspect, or produce for inspection, documents pursuant to a notice to admit	0	13	4	0	6	8
Or per hour	0	6	8	0	6	8
To examine and sign admissions	0	13	4	0	6	8
To inspect, or produce for inspection, documents referred to in any pleading, notice in lieu of pleading, or affidavit, pursuant to notice under Order XXXI, rule 14	0	6	8	0	6	8
Or per hour	0	6	8	0	6	8
To obtain or give any necessary or proper consent . . .	0	6	8	0	6	8
To obtain an appointment to examine witnesses . . .	0	6	8	0	6	8
On examination of witnesses before any examiner, commissioner, officer, or other person	0	13	4	0	13	4
Or according to circumstances, not to exceed	2	2	0	2	2	0
Or if without counsel, not to exceed	3	3	0	3	3	0
On deponents being sworn, or by a solicitor or his clerk to be sworn, to an affidavit in answer to interrogatories or other special affidavit	0	6	8	0	6	8
On a summons at Judges' Chambers	0	6	8	0	6	8
Or according to circumstances not to exceed	1	1	0	1	1	0
On counsel with brief or other papers—						
If counsel's fee one guinea	0	6	8	0	3	4
If more and under five guineas	0	6	8	0	6	8
If five guineas and under 20 guineas	0	13	4	0	6	8
If 20 guineas	1	1	0	0	13	4
If 40 guineas or more	2	2	0	—		
On consultation or conference with counsel	0	13	4	0	13	4
To enter or set down action, special case, or appeal, for hearing or trial	0	6	8	0	6	8
In court on motion of course and on counsel and for order	0	13	4	0	10	0
To present petition for order of course and for order .	0	13	4	0	10	0
In court on every special motion, each day	0	13	4	0	6	8
On same when heard each day	0	13	4	0	13	4
Or according to circumstances, not to exceed	2	2	0	2	2	0
On special case, or special petition, or application adjourned from the Judges' Chambers, when in the special paper for the day, or likely to be heard . . .	0	10	0	0	6	8
On same when heard	1	1	0	0	13	4
Or according to circumstances, not to exceed	2	2	0	2	3	0
On hearing or trial of any cause, or matter, or issue of fact, in London or Middlesex, or the town where the solicitor resides or carries on business, whether before a judge with or without a jury, or commissioner, or referee, or on assessment of damages when in the paper	0	10	0	0	10	0
When heard or tried	1	1	0	0	13	4
Or according to circumstances not to exceed	3	3	0	3	2	0
When not in London or Middlesex, nor in the town where the solicitor resides or carries on business, for each day (except Sundays) he is necessarily absent .	3	3	0	3	3	0
And expenses (besides actual reasonable travelling expenses) each day, including Sundays	1	1	0	1	1	0
Or if the solicitor has to attend on more than one trial or assessment at the time and place, in each case . .	1	11	6	1	1	0

	Higher Scale. £ s. d.	Lower Scale. £ s. d.
[★ 625] ★ The expenses in such case to be rateably divided.		
To hear judgment when same adjourned	0 13 4	0 6 8
Or according to circumstances	1 1 0	0 13 4
To deliver papers (when required) for the use of a judge prior to a hearing	0 6 8	0 6 8
If more than one judge	0 13 4	0 13 4
On taxation of a bill of costs	0 6 8	0 6 8
Or according to circumstances, not to exceed	2 2 0	2 2 0
Unless the same shall necessarily occupy so much time that the taxing officer shall consider such amount inadequate, in which case he may allow such further fee as he shall think proper		
To obtain or give an undertaking to appear	0 6 8	0 6 8
To present a special petition, and for same answered .	0 6 8	0 6 8
On printer to insert advertisement in *Gazette*	0 6 8	0 6 8
On printer to insert same in other papers, each printer	0 6 8	—
Or every two	—	0 6 8
NOTE.—An order of course means an order made on an *ex parte* application, and to which a party is entitled as of right on his own statement and at his own risk.		
OATHS AND EXHIBITS.		
Commissioner to take oaths or affidavits. For every oath, declaration, affirmation, or attestation upon honour in London or the country	0 1 6	0 1 6
The solicitor for preparing each exhibit in town or country	0 1 0	0 1 0
The commissioner for marking each exhibit	0 1 0	0 1 0
TERM FEES.		
For every term commencing on the day the sittings in London and Middlesex of the High Court of Justice commence, and terminating on the day preceding the next such sittings, in which a proceeding in the cause or matter by or affecting the party, after appearance entered, shall take place	0 15 0	0 15 0
And further, in country agency causes or matters, for letters	0 6 0	0 6 0
Where no proceeding in the cause or matter is taken which carries a term fee, a charge for letters may be allowed, if the circumstances require it.		
In addition to the above an allowance is to be made for the necessary expense of postages, carriage and transmission of documents.		

★APPEAL TO HOUSE OF LORDS. [★ 626]

APPELLATE JURISDICTION ACT, 1876.

Form of Appeal, method of Procedure, and Standing Orders applicable to all Appeals presented to the House of Lords on and after the 1st day of November, 1876.

Form of Appeal (Standing Order No. 1).

To the Right Honourable the House of Lords.

The humble petition and appeal of *A.* (*set forth the address of the appellant*).

Your petitioner humbly prays that the matter of the order (*or* orders, *or* judgment, *or* interlocutor) set forth in the schedule hereto (*or*, so far as therein stated to be appealed against) may be reviewed before Her Majesty the Queen, in her Court of Parliament, and that the said order (*or*, so far as aforesaid) may be reversed, varied, or altered, or that the petitioner may have such other relief (*if specific relief be desired it can be so stated in the prayer*) in the premises as to her Majesty the Queen, in her Court of Parliament, may seem meet; and that (*here name the respondents*) mentioned in the schedule to the appeal may be ordered to lodge such printed cases as they may be advised, and the circumstances of the cause may require, in answer to this appeal; and that service of such order on the solicitors in the cause of the said respondents may be deemed good service.

To be signed by two counsel. (*a*)

(*Here insert schedule*).

Note. The Schedule must set out the Title of, and parties to the cause or matter: and the decrees, orders, judgment, or interlocutors appealed against, and where the appeal is not against the whole decree the part appealed against must be defined.

FORM OF SCHEDULE.

"From Her Majesty's Court of Appeal (*England*).

"In a certain cause (*or* matter) wherein *A.* was plaintiff and *B.* was defendant. (*The names of all parties to the appeal, whether original plaintiffs or defendants in the cause or added by subsequent orders must be here set forth*).

"The order of (*state Court and date of order*) appealed from is in the words following, viz. (*set forth, in italics* throughout, *the whole of the order appealed from* (*b*)) (or, *when the order is appealed from in part only*). ★The order of (*state Court and date* [★ 627] *of order*) referred to in the above prayer is in the words following, the portion complained of being printed in italics (*set forth order, the* portion *complained of being printed in italics, the portion not complained of being printed in Roman type*)."

Standing Order No. II. (Signature of Counsel).

(*a*) In the event of the autograph signatures not being subscribed to the *parchment* appeal, the draft containing them must be shown to the clerks of the Judicial Department at the time of lodging the appeal.

(*b*) Where several Orders are appealed from, *each* Order must be headed with a statement of the Court and the date of the Order.

Standing Order No. II. (Certificate of Counsel.)

We humbly conceive this to be a proper case to be heard before your Lordships by way of appeal.

To be signed by two counsel. (*a*)

Certificate of notice to respondents to be written on the last page of the *parchment* appeal.

I , clerk to Messrs. , of , solicitors for the appellants within named, hereby certify that on the day of I served Messrs. , of , solicitors for , the within-named respondents, with a correct copy of the foregoing appeal, and with a notice that on the day of , or as soon after as conveniently may be, the petition of appeal would be presented to the House of Lords on behalf of the appellant.

DIRECTIONS FOR AGENTS.

N. B.—*All documents must be lodged in the Parliament Office before three o'clock on the day of presentation.*

Method of Procedure.

Presentation the appeal.

1. The appeal must be printed on parchment (*quarto size*).

2. Two clear day's notice of the intention to present the appeal, together with a correct copy of the appeal, (*b*) must be served on the respondents or their solicitors prior to presentation, and a certificate of such service entered on the appeal as above.

3. The appeal, together with four printed paper copies, may then be lodged in the Parliament Office; (*c*) and if the House be then sitting, or if not, on the next ensuing meeting of the House, the appeal will be presented to the House, and an order made requiring the respondents to lodge cases in answer to the appeal. This order will be issued (*d*) to the appellants' agent for service on the respondents or their solicitors, and the same, together with an affidavit (*e*) of due service entered *thereon*, must be returned [★ 628] to the Parliament Office *within* the ★ period granted to the appellant for lodging his printed cases under Standing Order No. V.

Order of Service,—*see* Standing Order No. III.

4. The several periods limited by the Standing Orders take effect from the date of the *presentation* of the appeal to the House, which is the date at the head of the order of service.

Security for Costs,—*see* Standing Order No. IV., and also Standing Order No. VII., with regard to expiry of time during recess.

5. Security for costs is given by recognizance to the amount of £500, and a bond for £200. In lieu of the bond, payment must be made of £200 into the Fee Fund of the House of Lords *within* one week after the *presentation* of the appeal to the House. (All drafts and cheques to be made payable to "House of Lords

(*a*) See note (*a*) on p. 626.

(*b*) It will be found convenient that the appellants' agent should supply the other side with at least five additional printed copies of the appeal.

(*c*) See also paragraph 9.

(*d*) In Scotch Appeals, when the "Order of Service" is desired on the day of presentation for the purpose of staying execution below, the appeal must be lodged in the Parliament office not later than *one o'clock* on the day of presentation, accompanied by a letter from the agent stating that the "Order" is required for the purpose of staying execution.

(*e*) Affidavit to be sworn before a commissioner duly appointed to administer oaths in England or Ireland or a justice of the peace in Scotland.

Fee Fund," and to be crossed "Bank of England, Western Branch.")

Recognizance.

6. The *recognizance* must be entered into by each appellant, where there are more than one. (It is usual to issue the recognizance for execution by the appellant at the time of the issue of the bond.) In the event of a *substitute* being proposed, the name of such substitute, together with a certificate of sufficiency by the solicitor or agent of the appellants, must be lodged in the Parliament Office within one week after the *presentation* of the appeal to the House; two clear days' notice of the name so proposed, together with a copy of the certificate, having been previously given to the solicitor or agent of the respondents. For form of certificate, see Appendix A. (*a*)

Bond.

7. The *bond* must be entered into by two sufficient sureties to the satisfaction of the clerk of the parliaments. The names of the proposed sureties, together with a certificate of sufficiency by the solicitor or agent of the appellants, must be lodged in the Parliament Office within one week after the *presentation* of the appeal to the House; two clear days' notice of the names so proposed, together with a copy of the certificate, having been previously given to the solicitor or agent of the respondents. For form of certificate, *see* Appendix A. (*a*)

Information as to sufficiency of sureties, &c. to be given to respondent's agent.

8. It is the duty of the solicitor or agent of the appellants, on giving the respondent's solicitor or agent notice of the names proposed as sureties or substitute, to furnish him with such information as will enable him to ascertain the sufficiency of the proposed sureties or substitute.

9. Whenever possible, it will be found convenient to lodge the above certificates, &c., relating to the recognizance and bond at the time of lodging the appeal. When this cannot be done, the appellant's agent should be prepared to state whether the recognizance is to be entered into by the appellant in person or by substitute, and whether a bond will be executed or the £200 deposited.

Execution of recognizance and bond.

10. At the termination of one week from the lodgment of the above certificates, the *bond* and *recognizance* are issued to the solicitor or agent of the appellants for execution before a commissioner ★appointed to administer oaths in the Supreme [★ 629] Court in Judicature in England or in Ireland, or before a justice of the peace of Scotland.

Return of recognizance and bond.

11. The bond and the recognizance (whether entered into by the appellants or by a substitute) *must* be returned to the Parliament Office within one week from the date of the issue thereof to the solicitor or agent of the appellants.

Objection of sureties or substitute.

12. If objection be taken by the respondent to the sureties or substitute proposed by the appellant, the respondent's agent must address a letter to the Clerk of the Parliaments setting forth the nature of the objection. This letter must be lodged in the Parliament Office within one week from the lodgment of the certificates of sufficiency in the Parliament Office.

Justification or sureties' substitute.

13. In the event of the clerk of the parliaments requiring a justification of the sureties, the appellants' agent must within one week from the date of an official notice to him to that effect, lodge in the Parliament Office an affidavit or affidavits by the proposed sureties setting forth specifically the nature of the property in consideration of which they claim to be accepted as sureties in respect of the bond, and also declaring that the pro-

(*a*) Forms to be filled up can be obtained on application to the Judicial Department.

perty in question is unincumbered. A copy of the affidavit or affidavits must be served on the agent of the respondents before lodging the same in the Parliament Office. If the respondents desire to file counter affidavits, the same should be lodged with as little delay as possible, copies having been served on the agent of the appellants.

14. If on persuing and considering these affidavits, the clerk of the parliaments deems the proposed surities not satisfactory, the appellant is required to pay into the Fee Fund of the House the sum of £200 as security for the costs of the appeal within four weeks from the date of an official notice by the clerk of the parliaments intimating his dissatisfaction with the proposed sureties. In default of such payment within the period aforesaid the appeal will stand dismissed.

15. The like practice is to be observed with regard to the substitute for the recognizance, with this exception, that in the event of the substitute being deemed by the clerk of the parliaments not satisfactory, the appellant or appellants are required to enter personally into the usual recognizance.

Appearance on behalf of respondents.

16. The solicitors of those respondents who propose lodging printed cases in answer to the appeal should attend at the Parliament Office for the purpose of ascertaining the due execution of the recognizance and bond, and entering their names in the appearance book. (Only solicitors who have thus entered appearance in the cause are entitled to notice of the meeting of the appeal committee).

Incidental petitions. Duplicate required where assent is not given.

17. Petitions presented in *incidental* applications are required to be engrossed on *foolscap, bookwise;* with regard to petitions in [★ 630] which an ★ assent cannot be obtained, two clear days' previous notice of the intention to present, together with a copy of the petition, must be served on the opposing agent, and a *duplicate* of the petition must be lodged in the Parliament Office, together with the original petition. The form of a petition for extension of time to lodge the appellant's cases is given in Appendix C.

18. Forms of petitions (subject to modification, if required), for the restoration of an appeal, for leave to sue *in formâ pauperis*, for revivor, and for withdrawal of an appeal, can be obtained from the Judicial Department. It will be found advisable in exceptional cases to submit a draft of the petition to the clerks of the Judicial Department.

Appeal committee. Counsel not heard. Affidavits.

19. Council are not heard before the appeal committee. All affidavits intended to be used in the appeal committee must be lodged with opposing agent within a reasonable time before the meeting of the committee, but are not to be filed in the Parliament Office.

Printed cases and appendix and "setting down" cause for hearing,—*see* Standing Order No. V.; and also Standing Order No. VII.

20. In English appeals six weeks' time, and in Irish and Scotch appeals eight weeks' time, from the date of the presentation of the appeal, is granted to all parties to lodge printed cases and the appendix thereto. These periods, when expiring during a recess of the House, are extended by Standing Order No. VII. Petitions for extension of time, *lodged* during the *prorogation of Parliament* (unless the House of Lords be sitting for judicial business), in cases in which time has been *already extended* on petition, do not prevent the dismissal of an appeal.

21. In appeals in which the parties are able to agree in their statement of the subject-matter, it is optional to lodge a *joint* case with reasons *pro* and *con.*, following the practice heretofore in use in common law appeals on a special case.

22. It is obligatory on the appellant; within the respective

periods so limited as above, to lodge his printed cases, or the joint case before mentioned, and a printed appendix consisting of such documents, or parts thereof, used in evidence in the court below, as may be necessary for reference on the argument of the appeal in support of his case. This appendix will be for the use of both parties on the hearing of the appeal. (See following paragraph with regard to the printing of *additional* documents by the respondent.)

Preparation of appendix.

23. It is the duty of the appellant, with as little delay as possible after the presentation of the appeal, to furnish to the respondent a list of the proposed documents, and in due course a proof copy of the appendix. The proof is to be examined with the original documents by the respective solicitors of the parties. (Ten copies of the appendix, as soon as printed, to be delivered to the soliciter of the respondent.) The respondent is allowed to print any *additional* ★ documents, used in [★ 631] evidence in the court below, which may be necessary for the support of his case on the argument of the appeal, such documents to be paged consecutively with the appendix, in order that the same may be eventually *bound* up with the appendix, and form *one* document for the use of the House on the hearing of the appeal. (The proof to be examined, as aforesaid, by the respective solicitors, and prints delivered to the solicitor of the appellant.) Shorthand notes of arguments in the courts below must not be printed by either party.

Respondent's *additional* documents.

24. The costs incurred in printing the appendix will, in the first instance, be borne by the appellant, and the cost of the *additional* documents by the respondent, but these costs will ultimately be subject to the decision of the House with regard to the costs of the appeal.

Signature of Counsel to case,—*see* Standing Order No. V.

25. The printed case must be signed by one or more counsel who shall have attended as counsel in the court below, or shall purpose attending as counsel on the argument at the bar.

Form of printed case.

26. The case and appendix must be printed quarto size, with seven or eight letters down the margin, and the title page of the appellant's case must contain, at the top, a reference to the report of the cause below, if reported, or, if not reported, "catch words" or "index words" similar to those prefixed to reports of causes in the Law Reports. The case and appendix should be submitted *in proof* to the clerks in the Judicial Office.

Reference to report of cause below.

27. Where reference is made to a document printed in the appendix, the case must contain a marginal note of the page of the appendix containing such document. The appendix must contain an index to the documents therein.

Number of printed cases required to be lodged by the appellant and respondent.

28. Forty copies of each case and appendix are required to be lodged in the Parliament Office to comply with Standing Order No. V.; and subsequently, on the lodgment of the respondent's case, ten *bound* copies (*see directions in the Appendix hereto as to binding printed cases, appendix, additional documents, and printed copies of the appeal for the use of the House on the hearing of the appeal*).

Setting down for hearing *ex parte*. Subsequent lodgment of respondent's case.

29. A respondent can only be heard at the bar upon lodging a printed case. If the respondent's case is not lodged within the time specified in the order of service, the cause is, on the lodgment of the appellant's case and the appendix, "set down for hearing *ex parte*;" but the respondent may nevertheless at any time afterwards lodge his printed case, and thus put himself in the same position as if he had lodged it within the time specified in the order of service. When, however, the lodgment has been delayed until a day for hearing the cause has been actually

appointed, the respondent is required to petition for leave to lodge his printed case, and submit to whatever order the House may make on his petition.

Exchange of printed cases.

[★632] ★30. After the lodgment of the printed cases by the appellants and respondents, the respective cases are to be exchanged at the offices of the solicitors; the respondent's agent supplying the appellant's agent with the additional number of cases required for the *bound* copies.

Setting down cause for hearing.

31. As soon as the printed cases of all parties and the appendix thereto have been lodged, it is optional for either side to set down the cause for hearing, but it is *obligatory* on the appellant, upon the lodgment of his printed cases and the appendix, to set down the cause for hearing within the time limited by Standing Order No. V (*ex parte* as to those respondents who have not already lodged printed cases, upon proof, by affidavit, of the due service of the before-mentioned "order of service" upon the respondents or their solicitors). A respondent who has lodged his printed cases is at liberty to set down the cause for hearing on the first *sitting* day after the expiration of the time limited by the standing order for lodging printed cases.

32. The cause will then be ripe for hearing, and will take its position on the effective cause list.

Causes under compromise.

33. Causes the hearing of which has been postponed on the ground of their being under compromise are placed at the bottom of the effective cause list in the event of no compromise being arrived at.

Hearing of the appeal. Documents printed in the case and appendix.

34. On the hearing of appeal, the agents are required to have the *originals* (or such copies thereof as were accepted in evidence in the court below in lieu of the originals) of all documents set forth in the printed case and appendix in readiness below the bar, in case the House desires to refer to such originals or accepted copies (see following paragraphs as to exception with regard to Irish and Scotch Appeals).

Irish appeals.

35. In Irish Appeals in cases in which the original documents are filed in the Irish Courts, and cannot be readily procured, office copies, duly signed by the proper officer of the court from whence they issue, as certifying the correctness of the same, must be in readiness below the bar on the hearing of the appeal (subject always to the production of the originals if required by the House).

Scotch appeals.

36. In Scotch Appeals a copy of the record, duly certified by the proper officer of the court below, must be lodged with the pursebearer of the Lord Chancellor a few days before the hearing of the appeal. Subject to special direction by the House, the originals of documents contained in the record are not required to be at the bar.

Abatement, —*see* Standing Order No. VIII.

37. In the event of the death of any of the parties to an appeal, immediate notice should be given by letter addressed to the Clerk of the Parliaments, and lodged in the Judicial Office. The [★633] letter must ★state whether the appeal abates or does not abate by reason of the death in question.

An appeal is held to abate through death when it becomes necessary to add a new party or parties to the appeal to represent the deceased person's interest.

An appeal is held not to abate through death when the interest of the deceased person is represented by any of the surviving parties to the appeal.

In appeals from England and Ireland, in which it is necessary to add new parties to the appeal, an order must be first obtained in the court below making such persons parties to the cause, and an office copy of the order must be annexed to the petition for revival presented to this House.

In appeals from Scotland, the record being closed in the court below, the petition for revival is presented directly to the House, and a certified copy of the confirmation of the executors of the deceased person must be annexed to the petition.

In the case of appeals which do not abate through death it is necessary in the printed cases to print the words "(since deceased)" against the name of the deceased person in the title of the appeal.

Defect through bankruptcy, —*see* Standing Order No. VIII.

In the case of an appeal which becomes defective through the bankruptcy of any of the parties, a letter must be addressed to the Clerk of the Parliaments, and lodged in the Judicial Office, stating the fact of such bankruptcy, and to this letter must be annexed an office copy of the order of the Court adjudicating bankruptcy.

The effect of abatement, or of defect through bankruptcy on the procedure of the appeal, the period within which steps must be taken for a revival of the appeal, or for rendering the same effective, and regulations for the lodgment of supplemental cases, are set forth in Standing Order No. VIII.

Costs,—*see* Standing Order No. X., and directions as to the taxation of costs. Appendix E.

38. Forms of bills of costs relating to appeal cases may be obtained at the office for the sale of printed papers House of Lords.

Directions as to the sum of £200 under Standing Order No. IV.

39. In all cases where the appellant has paid in the sum of £200 as directed by Standing Order No. IV., and where the House shall make any order for payment of costs by the appellant to the respondent, the clerk of the parliaments or clerk assistant shall pay over to the respondent or his agent the said sum of £200, or so much thereof as will liquidate the amount reported to the clerk of the parliaments or clerk assistant by the taxing officer, as being due from the appellant to the respondent in respect to the appeal. And in all cases where the amount so reported by the taxing officer shall exceed £200, the clerk of the parliaments or clerk assistant shall in his certificate credit the appellant with the £200 so paid over to the respondent. And where there be two or more respondents entitled to their separate ★ costs, the said £200 shall be divided between the re- [★ 634] spondents in proportion to the amount of costs reported by the taxing officer to be due to each respondent. And where, after satisfying the order of the House, there be any sum remaining, part of the said £200, the same shall be paid back to the appellant or his agent upon a proper receipt for the same being given to the clerk of the parliaments or clerk assistant.

Appeals affirmed.

Appeals reversed.

40. In all cases in which the appellant is not ordered to pay the costs of the appeal, the clerk of the parliaments or clerk assistant shall, on receiving a proper receipt for the same, pay back to the appellant or his agent the said sum of £200.

Appeals dismissed for want of prosecution.

41. In cases in which an appeal is dismissed for want of prosecution, the appellant shall be at liberty to serve a notice of such dismissal according to the form set forth in Appendix D. upon the agent of the respondents (such service to be verified, if necessary, by affidavit), and unless the respondent shall, within four weeks from the date of such service, if the House be sitting at the expiration of the said four weeks, or, if not, then not later than the third sitting day of the next ensuing sittings of the House, lodge in the office of the taxing officer of the House a copy of his bill of costs, the clerk of the parliaments or clerk assis-

tant shall, upon a proper receipt for the same being given, repay to the appellant or his agent the said sum of £200. In the event of the respondent so lodging his bill of costs as aforesaid, the taxing officer may, if the sum demanded by the respondent be less than £200, tax the same, and the clerk of the parliaments or clerk assistant shall pay over to the respondent or his agent so much of the said sum of £200 as will liquidate the amount reported to the clerk of the parliaments or clerk assistant as being due from the appellant to the respondent in respect of the appeal, and the remaining portion of the said sum of £200 shall be paid back to the appellant or his agent upon a proper receipt for the same being given to the clerk of the parliaments or clerk assistant.

SUMMARY OF ORDINARY PROCEDURE IN APPEALS.

(For full instructions see foregoing "Directions for Agents" and the Standing Orders.

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1. A proof copy of the petition of appeal may, when deemed necessary, be submitted to the clerks of the Judicial Department.
2. Lodgment of appeal, printed on parchment, together with four paper copies thereof, in the Parliament Office for presentation to the House,—intimation with regard to recognizance and bond.

[★635] ★3. Issue to appellant's agent of "Order to Service."

4. Payment of £200, or lodgment of certificate with regard to bond; and lodgment of certificate with regard to substitute for recognizance.
5. Issue to appellant's agent of recognizance and bond for execution.
6. Return of recognizance and bond.
7. Attendance of respondent's agent to enter appearance, and inspect recognizance and bond.
8. Return of "Order of Service," with affidavit entered thereon.
9. Lodgment of forty printed cases and appendix. A proof copy of the case may, when deemed necessary, be submitted to the clerks of the Judicial Department.
10. Setting down cause for hearing.
11. Lodgment of ten bound cases, &c., by appellant.
12. Hearing of appeal, directions as to original documents.
13. Directions with regard to abatement by death, or defect by bankruptcy.
14. Directions with regard to the taxation of costs, &c.

STANDING ORDERS APPLICABLE TO ALL APPEALS PRESENTED TO THE HOUSE LORDS ON OR AFTER THE 1ST DAY OF NOVEMBER, 1876.

STANDING ORDER I.

(Standing Order I. is only applicable to Decrees, &c., pronounced on and after the 1st day of November, 1876.)

Time limited ORDERED, that, except where otherwise provided by statute, no petition of appeal be received by this House unless the same

be lodged in the Parliament Office for presentation to the House within one year from the date of the last decree, order, judgment or interlocutor appealed from. for presenting appeals.

In cases in which the person entitled to appeal be within the age of one and twenty years, or covert, *non compos mentis*, imprisoned, or out of Great Britain and Ireland, such person may be at liberty to present his appeal to the House, provided that the same be lodged in the Parliament Office within one year next after full age, discoverture, coming of sound mind, enlargement out of prison, or coming into Great Britain or Ireland: But in no case shall any person or persons be allowed a longer time, on account of mere absence, to present an appeal, than five years from the date of the last decree, order, judgment, or interlocutor appealed against.

★ STANDING ORDER II. [★ 636]

Ordered, that all petitions of appeal be signed, and the reasonableness thereof certified, by two counsel who shall have attended as counsel in the court below, or shall purpose attending as counsel at the hearing in this House. Appeals to be signed and certified by counsel.

STANDING ORDER III.

Ordered, that the "order of service" issued upon the presentation of an appeal for service on the respondent or his solicitor, be returned to the Parliament Office, together with an affidavit of due service entered thereon, within the time limited by Standing Order No. V. for the appellant to lodge his printed cases, unless within that period all the respondents shall have lodged their printed cases; in default, the appeal to stand dismissed. "Order of service."

STANDING ORDER IV.

Ordered, in all appeals that the appellant or appellants do give security to the clerk of the parliaments by recognizance to be entered into, in person or by substitute, to the Queen of the penalty of five hundred pounds, conditioned to pay to the respondent or respondents all such costs as may be ordered to be paid by the House in the matter of appeal; and further, that the appellant or appellants do procure two sufficient sureties, to the satisfaction of the clerk of the parliaments, to enter into a joint and several bond to the amount of two hundred pounds, or do pay in to the account of the Fee Fund of the House of Lords the sum of two hundred pounds: such bond, or such sum of two hundrd pounds, to be subject to the order of the House with regard to the costs of the appeal: Ordered, that within one week after the presentation of the appeal the appellant or appellants do pay in to the account of the Fee Fund of the House of Lords the said sum of two hundred pounds, or submit to the clerk of the parliaments the names of the sureties proposed to enter into the said bond; and, in the event of a substitute being proposed to enter into the said recognizance, the name of such substitute; Security for costs.

two clear days' previous notice of the names so proposed for bond and recognizance to be given to the solicitor or agent of the respondent:

Justification of sureties and substitute.

ORDERED, that, in the event of the clerk of the parliaments requiring a justification of the sureties, or substitute, the appellant's agent shall, within one week from the date of an official notice to him to that effect, lodge in the Parliament Office an [★637] affidavit or affidavits by ★ the proposed sureties, or substitute, setting forth specifically the nature of the property in consideration of which they claim to be accepted as sureties in respect of the bond, or as substitute in respect of the recognizance, and also declaring that the property in question is unincumbered: Ordered, that, in the event of such sureties not being deemed satisfactory by the clerk of the parliaments, the appellant or appellants shall, within four weeks from the date of an official notice by the clerk of the parliaments to that effect, pay into the account of the Fee Fund of the House of Lords the sum of two hundred pounds, to be subject to the order of the House with regard to the costs of the appeal; and, in the event of such substitute not being deemed satisfactory by the clerk of the parliaments, the appellant or appellants shall enter into the usual recognizance in person:

Period for return of bond and recognizance to Parliament Office.

ORDERED, That the said bond and the recognizance (whether entered into by the appellants or by a substitute) be returned to the Parliament Office duly executed within one week from the date of the issue thereof to the solicitor or agent of the appellant or appellants.

On default by the appellant or appellants in complying with the above conditions, the appeal to stand dismissed.

STANDING ORDER V.

Printed cases, time limited for lodging and for setting down the cause for hearing.

1. ORDERED, that in English appeals the printed cases and the appendix thereto be lodged in the Parliament Office within six weeks from the date of the presentation of the appeal to the House; in Scotch and Irish appeals, within eight weeks; and the appeal set down for hearing on the first *sitting* day after the expiration of those respective periods (or as soon before, at the option of either party, as all the printed cases and the appendix shall have been lodged); on default by the appellant the appeal to stand dismissed.

Scotch appeals.

2. ORDERED, that in all appeals from Scotland the appellant alone, in his printed case or in the appendix thereto, shall lay before this House a printed copy of the record as authenticated by the Lord Ordinary; together with a supplement containing an account, without argument or statement of other facts, of the further steps which have been taken in the cause since the record was completed, and containing also copies of the interlocutors or parts of interlocutors complained of; and each party shall in their cases lay before the House a copy of the case presented by them respectively to the Court of Sessions, if any such case was presented there, with a short summary of any additional reasons upon which he means to insist; and if there shall have been no case presented to the Court of Session, then each party shall set [★638] ★forth in his case the reasons upon which he founds his argument as shortly and succinctly as possible.

Printed cases to be signed by counsel.

3. ORDERED, that all printed cases be signed by on or more counsel, who shall have attended as counsel in the court below, or shall purpose attending as counsel at the hearing in this House.

STANDING ORDER VI.

Cross appeals.

ORDERED, that all cross appeals be presented to the House within the period allowed by Standing Order No. V. for lodging cases in the original appeal.

STANDING ORDER VII.

Expiry of time during recess.

ORDERED, with regard to appeals in which the periods under Standing Orders Nos. III., IV., V., and VI. expire during the recess of the House, that such periods be extended to the third sitting day of the next ensuing meeting of the House.

STANDING ORDER VIII.

Abatement or defeat.

ORDERED, that in the event of abatement by death or defect through bankruptcy, an appeal shall not stand dismissed for default under Standing Orders Nos. III., IV., V., provided that notice of such abatement or defect be given by letter addressed to the clerk of the parliaments, and lodged in the Judicial Office prior to the expiration of the period limited by the standing order under which the appeal would otherwise have stood dismissed.

Revivor, &c.

ORDERED, that all appeals marked on the cause list of the House as abated or defective shall stand dismissed unless within three months from the date of the notice to the clerk of the parliaments of abatement or defect, if the House be then sitting, or, if not, then not later than the third sitting day of the next ensuing sittings of the House, a petition shall be presented to the House for reviving the appeal or for rendering the same effective.

Supplemental cases to be delivered in where appeals are revived or parties added.

ORDERED, that where any party or parties to an appeal shall die pending the same, subsequently to the printed cases having been lodged, and the appeal shall be revived against his or her representative or representatives as the person or persons standing in the place of the persons so dying as aforesaid, a supplemental case shall be lodged by the party or parties so reviving the same respectively, stating the order or orders respectively made by the House in such case.

★ The like rule shall be observed by the appellant [★ 639] and respondent respectively, where any person or persons shall, by leave of the House, upon petition or otherwise, be added as a party or parties to the said appeal after the printed cases in such appeal shall have been lodged.

STANDING ORDER IX.

Scotch appeals. Certificate of leave or difference of opinion to be signed by counsel on appeals.

ORDERED, that when any petition of appeal shall be presented to this House from any interlocutory judgment of either division of the Lords of Session in Scotland, the counsel who shall sign the said petition, or two of the counsel for the party or parties in the court below, shall sign a certificate or declaration, stating either that leave was given by that division of the judges pronouncing such interlocutory judgment to the appellant or appellants to present such petition of appeal, or that there was a difference of opinion amongst the judges of the said division pronouncing such interlocutory judgment.

STANDING ORDER X.

Taxation of costs.

ORDERED, that the clerk of the parliaments shall appoint such person as he may think fit as taxing officer, and in all cases in which this House shall make any order for payment of costs by any party or parties in any cause without specifying the amount, the taxing officer may, upon the application of either party, tax and ascertain the amount thereof, and report the same to the clerk of the parliaments or clerk assistant: And it is further ordered, that the same fees shall be demanded from and paid by the party applying for such taxation for and in respect thereof as are now or shall be fixed by any resolution of this House concerning such fees; and the taxing officer may, if he think fit, either add or deduct the whole or a part of such fees at the foot of his report: And the clerk of the parliaments or clerk assistant may give a certificate of such costs, expressing the amount so reported to him as aforesaid, and in his certificate regard shall be had to the sum of £200 where that amount has been paid in to the account of the Fee Fund of the House as directed by Standing Order No. IV.; and the amount in money certified by him in such certificate shall be the sum to be demanded and paid under or by virtue of such order as aforesaid for payment of costs.

[★ 640] ★ APPENDIX A.

CERTIFICATE OF SUFFICIENCY OF SURETIES, &C.

Lodged in the Parliament Office on the day of 18 .

In the House of Lords.

"A. and others *v.* B. and others."

In compliance with Standing Order No. IV., I (we) submit the names of (*full name*) of (*address*) and (*full name*) of (*address*) { as fit and proper sureties / or, as a fit and proper substitute } to enter into the { bond / recognizance } thereby required: and I (we) certify that, in { my / our } belief, the said (*full name*) and the said (*full name*) { are / each / is } worth upwards of { £200 / £500 } over and above { their / his } just debts.

This certificate may be signed by the COUNTRY solicitor or agent of the appellants.

I (we) certify that a copy of the above certificate, with two clear days' notice of the intention to lodge the same in the Parliament Office, has been served on the solicitors or agents of the respondents.

To be signed by the LONDON solicitor or agent of the appellants.

APPENDIX B.

DIRECTIONS FOR BINDING PRINTED CASES AND PRINTED COPIES OF THE APPEAL FOR THE USE OF THE LAW LORDS.

1. Ten copies bound in purple cloth; two of the ten to be interleaved, as regards the cases only.

2. Short title of cause on the back.
3. Label on side, stating short title of cause and contents of the volume, thus:—

"A. and others *v.* B. and others."
Printed copy of the appeal.
Appellants' case.
Respondent B.'s case.
Respondent C.'s case.
Appendix (consisting of the appendix lodged by the appellant, and the *additional* documents, if any, lodged by the respondent).

★ 4. The volume to be indented, and the names of [★ 641] the parties written on the indentations to their respective cases.
5. The bound copies to be lodged immediately after the respondents' cases are delivered in.

In dealing with bulky cases, it may be found advisable to bind the appendix as a separate volume.

It is the duty of the appellants' agent to carry out these directions.

APPENDIX C.

PETITION FOR EXTENSION OF TIME TO LODGE CASES, &C.

(*To be engrossed on foolscap paper, and lodged in the Parliament Office, if assented to by respondent's agent. If not assented to, a copy, and two clear days' notice of intention to present, must be given to respondent's agent, and the original petition and a* duplicate *thereof, lodged in the Parliament Office.*)

In the House of Lords.

(*Insert Short Title of Cause.*)

To the Right Honourable the House of Lords.

The humble petition of the appellant

Sheweth,

That your petitioner presented petition of appeal on the day of complaining of (*insert dates of Orders or Interlocutors complained of*).

That the time allowed by Standing Order No. V. ((*or*) extended by your Lordships' order of the (*state date*)) for the appellant to lodge his printed cases and the appendix will expire on the (*state date*).

That your petitioner (*set forth cause of delay*).

Your petitioner therefore humbly prays that your lordships will be pleased to grant him an extension of time until (*specify the date to which extension of time is required*) to lodge his printed cases, and the appendix, and set down the cause for hearing.

And your petitioner will ever pray.

Agents for the appellant.

We consent to the prayer of the above petition.

Agents for the respondents.

[★642] ★APPENDIX D.

FORM OF NOTICE TO THE RESPONDENT OR HIS AGENT WITH REGARD TO THE APPLICATION OF THE APPELLANT FOR REPAYMENT OF THE SUM OF £200 UNDER STANDING ORDER NO. IV.

In the House of Lords.

A. Appellant.
B. Respondent.
(Appeal lately depending in the House of Lords.)

Take notice that the above appeal has been dismissed for want of prosecution, and that the appellant intends to apply to the clerk of the parliaments for repayment of the sum of £200 paid by him into the House of Lords Fee Fund under Standing Order No. IV. The respondent is required by the rules of the House, if any costs have been incurred by him in respect of the appeal, to lodge with the taxing officer of the House a copy of his bill of costs within four weeks from the date of the service of this notice upon the respondent or his agent, if the House of Lords be then sitting, or not later than the third day on which the House shall sit after the expiration of the said four weeks; and in default, the clerk of the parliaments will be at liberty forthwith to repay to the appellant the said sum of £200.

To

APPENDIX E.

TAXATION OF COSTS.

COSTS TAXABLE BY THE TAXING OFFICER OF THE HOUSE OF LORDS, AND MODE OF PROCEEDING.

The costs taxable by the taxing officer of the House of Lords are :—

Private Bills, Provisional Orders, &c.

All costs, charges, and expenses, including the expenses of witnesses, of and incidental to the preparation, bringing in, and carrying through Parliament any railway or other local and personal bill and any estate or other private bill, or any Provisional order or provisional certificate, and the costs, charges, and expenses incurred in opposing any such bill, provisional order, or provisional certificate.—Such costs are taxed either under the provisions of the 12 & 13 Vict. c. 78, and the 28 & 29 Vict. c. 27, *or upon a requisition of one of Her Majesty's Principal Secretaries of State, or by the Local Government Board, or upon a requisition from either of the Courts in England, Ireland, or Scotland, or at the request of the parties interested in the same.*

Appeal cases.

[★643] ★All costs, charges, and expenses of or incidental to appeal cases in the House of Lords.—Such costs are taxed under an order or judgment of the House, and in pursuance of a standing order, or upon a requisition from either of the Courts, or at the request of the parties interested in the same ; such costs being taxed either as between *Party and Party*, or as between *Solicitor and Client*, as the case may require.

All costs, charges, and expenses, including the expenses of witnesses, of and incidental to establishing claims to peerages and claims to vote.—Such costs are taxed upon a requisition from either of the Courts or at the request of the parties interested in the same. Expenses of witnesses, claims to peerages, &c.

The Mode of Proceeding.

When the costs are to be taxed under the provisions of 12 & 13 Vict. c. 78, a copy of such costs, with an indorsement thereon stating that a copy of such costs had been duly served upon A. and B., who are the parties liable to pay the same, and requesting an appointment to tax, must be deposited in the taxing office of the House of Lords, and due notice of an appointment to tax will be sent from the taxing office to each party.

When costs are to be taxed under the provisions of 28 & 29 Vict. c. 27, a copy of such costs (*with an indorsement thereon stating that the provisions of section 3 of the above Act so far as the same relate to the delivery of the bill of costs to the party chargeable with the same, have been complied with, and requesting an appointment to examine and tax the same*) must be deposited in the taxing office; and such application must be made to the taxing officer within the time limited by the said section of the said Act.

The bills of cost which are referred by either of the Courts are usually exhibits in the Court by which they are referred, in which case there is endorsed on the back of the original bill a requisition in the following words:

The Master of the Rolls, Chief Clerk, Taxing Master of the Chancery Division of the High Court of Justice (or as the case may be) requests the Taxing Officer of the House of Lords to tax the within bill of costs, and to report to him the amount at which he has allowed the same.

(Signed) A. B.

NOTICE.

Any parliamentary agent, attorney, solicitor, or other person applying for the taxation of any bill of costs, charges, and expenses incurred by him in promoting or opposing any private bill, provisional order, or provisional certificate in Parliament, is desired to deposit in the office of the taxing officer, at the time of making such application, a copy of such bill of costs, charges, and expenses, with the several ★ items added up and the [★644] amount ascertained and set out, together with a declaration signed by him stating that such bill of costs, charges, and expenses has been duly delivered to the parties charged therewith (naming the parties), in conformity with the Taxation of Costs Acts, 1847 and 1849, or the Act for awarding Costs, 1865, as the case may be.

Any application for such taxation should, in the first instance be made to the taxing officer of the House in which the bill to which the same relates commenced, or opposition had, or in which costs have been awarded in pursuance of the Act for Awarding Costs, 1865.

Taxing Office, House of Lords,
February, 1st, 1876.

COSTS RELATING TO APPEALS TAXED UNDER A JUDGMENT OR ORDER OF THE HOUSE AND STANDING ORDER NO. X.

Applications must be made by depositing in the office of the taxing officer a copy of the bill of costs, with an indorsement thereon stating that "a copy of this bill of costs was on the day of served upon *A.B.*, the agent for the apellant or the respondent, as the case may be, and we hereby request that an appointment may be made to tax the same.

Dated this day of 187 .

A.B.,
Agent for the appellant or respondent,
as the case may be.

To the
Taxing Officer of the House of Lords."

NOTE.—The taxing office is open throughout the session, and from the first Monday in the month of December in each year.

Taxing Office, House of Lords,
10th June, 1879.

B. S. R. ADAM,
Taxing Officer.

Printed forms of bills of costs, to be adopted by attorneys and solicitors having charge of appeal cases in the House of Lords may be obtained at the office for the sale of printed papers, House of Lords.

[★645] ★ AFFIDAVIT FOR HABEAS CORPUS TO ASSIGN ERRORS.

In the High Court of Justice,
Queen's Bench Division.
[*Lincolnshire.*]—*A.B.*, Plaintiff in Error.
against
The Queen, Defendant in Error.

I, *C.D.*, of , make oath and say:—

1. That at [*the general quarter sessions of the peace*], held at in and for the county of , *A.B* was convicted upon an indictment against him for , and sentenced by the said Court of [*quarter sessions*], to be [imprisoned, *or as the case may be*].

2. That a writ of Error has been granted by the Attorney-General and issued, returnable in this Court on the day of 188 , at [*as the case may be*]. And that it is necessary that the said *A.B.* should be brought before this honourable Court in order that he may assign errors on the return of the said writ.

Sworn, &c.

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